

USAWC STRATEGY RESEARCH PROJECT

**HOSTILE OUTSIDER OR INFLUENTIAL INSIDER?
THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT**

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ABSTRACT

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In 1998, following history's bloodiest century, the global community established a permanent International Criminal Court to investigate and prosecute heinous crimes such as genocide. Initially supporting the Court, the US later renounced all obligations to it based on perceived "fundamental flaws." While the UN and most democratic/allied nations endorse it, the US strenuously opposes and actively seeks to undermine the Court's capabilities, causing considerable discord and resentment. Already losing substantial international standing over recent policies on world events, the US is also harshly criticized over its Court opposition. Continued resistance risks greater isolationism and lack of credibility/support, something the US cannot afford. Moreover, history demonstrates that absent the Court's enforcement mechanisms, impunity will reign. To perform a significant role in the ICC—and maintain its reputation for promoting human rights, justice, and the rule of law—the US must ratify the Court's governing statute or, at a minimum, adopt a strategy and policy of conciliation and cooperation, not obstruction and antagonism. This paper encourages greater study and debate of this misunderstood yet vital aspect of US national security policy and strategy, ultimately proposing that the US policy toward the ICC become that of an influential insider vice hostile outsider.

HOSTILE OUTSIDER OR INFLUENTIAL INSIDER? THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT

As the most powerful nation committed to the rule of law, we have a responsibility to confront assaults on humankind....Our legacy must demonstrate an unyielding commitment to the pursuit of justice.¹

—David J. Scheffer
US Ambassador for War Crimes

Genocide.² Ethnic Cleansing.³ Crimes against Humanity.⁴ War Crimes.⁵ The mere mention of these terms evokes chilling images of torture, suffering, and death. Yet beginning in 1899, with atrocities committed during the Anglo-Boer War, and continuing to present day with the carnage in Darfur, Sudan, the last century has produced deprivation, persecution, and carnage on an immense scale, incomparable with any other period in time.⁶

The instances of cruelty and mortality are beyond measure. Following the Boer War,⁷ the years 1915-18 witnessed the Armenian Genocide in the early phase of World War I.⁸ World War II ushered in both the Nazi menace, with its Holocaust and countless similar atrocities,⁹ and the Japanese Imperial Army, complete with horrifying prisoner of war and civilian abuse, to include the “Rape of Nanking,” in the 1930s and 1940s.¹⁰ The period from 1960 to 1980 saw shocking war crimes in Vietnam¹¹ and the Khmer Rouge’s brutal Cambodian Genocide.¹² The century closed with ethnic cleansing in the Balkans,¹³ genocide in Rwanda,¹⁴ crimes against humanity in Sierra Leone,¹⁵ and the horror continues today in Sudan.¹⁶

Not surprisingly, at the conclusion of what ranks as the bloodiest century in history,¹⁷ the international community met in Rome, Italy to discuss the formation of an independent and permanent International Criminal Court (ICC or Court) capable of investigating and prosecuting those who commit such heinous crimes.¹⁸ The 1998 Rome Conference was the most recent, and aggressive, effort yet by the world community toward the establishment of a permanent, global criminal tribunal. The conference laid the Court’s foundation, producing a treaty establishing the ICC, initially adopted by more than two-thirds of the participating nations.¹⁹ Subsequently ratified by over sixty nations, the treaty became effective on 1 July 2002, finally making the Court—and justice for both perpetrators and victims—a reality.²⁰

The US, after participating significantly in Rome and signing the treaty, later formally renounced all obligations under the treaty based on several perceived “fundamental flaws.” While the UN, most democratic/allied nations, and countless human rights entities endorse the ICC,²¹ the US has strenuously opposed it, at times actively seeking to undermine its capability to perform as intended. As such, considerable discord and resentment have ensued between

the US and the Court's many proponents. Already losing substantial international standing due to recent policy decisions—to include those related to the continuing conflict in Iraq—and a failed strategic communications strategy, the US has been subject to harsh criticism over its ICC opposition. Continued resistance only risks greater isolationism and lack of credibility and support, something at present the US cannot afford. Moreover, history clearly demonstrates that absent the enforcement mechanisms of the ICC, to address individual responsibility, horrific crimes will continue and impunity will reign. Accordingly, the US, which still has an opportunity to play a significant role with the Court—and maintain its reputation of promoting human rights, justice, and the rule of law—should ratify the Rome Statute or, at a minimum, adopt a strategy and policy of conciliation and cooperation instead of obstruction and antagonism.

This paper chronicles, in Part II, the evolution of the ICC concept from its inception, spanning more than a century.²² Part III details the process by which the ICC operates, highlighting matters considered by the Court since July 2002. With this as background, Part IV identifies and analyzes the US objections to the Court's current charter and composition, while Part V examines the US response to the Court's formation. My intent is that Parts II - V encourage a greater awareness of the Court's strengths and weaknesses, and stimulate continued study of and debate over the concerns surrounding this misunderstood yet vital aspect of US national security policy and strategy.²³ Finally, Part VI contains recommendations regarding the US and the ICC, ultimately proposing that, for a multitude of reasons, the US policy toward the ICC become that of an influential insider vice hostile outsider.²⁴

The Evolution of the International Criminal Court

Our time—this decade even—has shown us that man's capacity for evil knows no limits. Genocide...is now a word of our time, too, a heinous reality that calls for a historic response.²⁵

That historic response was the Rome Statute of the ICC, adopted on 17 July 1998,²⁶ effectively establishing the Court and capping over a century of efforts, on various fronts, to create an international criminal court.²⁷ As early as 1872, following the Franco-Prussian War, advocates had appealed for a global court to prosecute grave crimes of significant concern to the worldwide community.²⁸ The pleas echoed again in 1919 following WWI, emanating from those involved in negotiating the Treaty of Versailles, owing to concern over creating an international body to prosecute German war criminals.²⁹ Following WWII, interest piqued yet again at the prospect of trying both German and Japanese war criminals.³⁰ This time, the international community heard the calls. In 1948, the UN General Assembly (UNGA) adopted the Genocide Convention, which reiterated the now rapidly growing demand for an “international

penal tribunal” to investigate and prosecute the most heinous crimes.³¹ The Convention “invited” the UN International Law Commission (ILC) to “study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide.”³² After much scrutiny, the ILC advocated developing a draft statute, which was completed by 1953.³³ Unfortunately, the UN then considered the ICC concept only periodically over the next forty years.³⁴

Following the Nuremburg and Tokyo Tribunals, significant human rights abuses continued to transpire.³⁵ Yet the world could not resolve to establish a court to address the senseless slaughter until the UN Security Council (UNSC) finally established *ad hoc* tribunals for Yugoslavia and Rwanda in 1993 and 1994—and this only in the face of indisputable evidence of millions being massacred.³⁶ Somewhat simultaneously, the ILC resumed its work on the ICC.³⁷ In 1993-1994, the ILC presented a final draft statute to the UNGA, which then created two separate committees to prepare for an impending forum on the ICC.³⁸

Finally, in June-July 1998, representatives from 163 nations, to include the US, came together in Rome as part of a UN Diplomatic Conference on establishing an ICC. Five tedious yet tumultuous weeks of intensive dialogue and debate ensued. What emerged was an overwhelming vote to adopt the Rome Statute, setting the stage for the first enduring global criminal court.³⁹ Once ratified,⁴⁰ the treaty entered into force on 1 July 2002⁴¹—establishing the Court a mere 130 years after the first calls, and over 50 years since the UN formally recognized its necessity.⁴² Yet as the ICC finally became operational, struggling to find its legs, storms were already brewing—tempests named Uganda, Congo, and Sudan.

The Operations of the International Criminal Court⁴³

The ICC is the first permanent, treaty-based world criminal court possessing international jurisdiction.⁴⁴ It is separate from and independent of the UN, unlike its predecessor international criminal tribunals in Yugoslavia and Rwanda, which were developed within the UN construct.⁴⁵ The Rome Statute established the Court’s operations—including its structure, duties, and jurisdiction, as well as rules for limited oversight by the Assembly of States Parties, the Court’s governing body.⁴⁶

Structure and Duties. The Court is now a functioning judicial institution in its official seat in the Hague, the Netherlands. It is comprised of four organs—the Registry, the Prosecutor, the Presidency, and the Chambers. The Registry provides all administrative and operational support to the Court as per the Presidency. The Prosecutor is responsible for receiving and evaluating referrals, information, evidence, and testimony concerning crimes within the ICC’s

jurisdiction, initiating investigations, and prosecuting cases before the Court. The Presidency, which is comprised of three judges elected from within the Chambers by a simple majority vote, manages the Court's administration, judicial actions, and serves as the Court's primary representative and official voice. Finally, the Chambers includes six judges in each of three chambers—Pre-Trial, Trial, and Appeals.⁴⁷

Jurisdiction and Admissibility. The Statute provides three methods, on a two-track system of jurisdiction, for referring potential cases over which the Court may exercise jurisdiction.⁴⁸ First, the UNSC, acting pursuant to authority under Chapter VII of the UN Charter, may refer a matter to the Prosecutor—the first track. Second, a state party may refer the “relevant circumstances” of a matter, along with supporting documentation, if possible, to the Prosecutor. Third, absent such referral, the Prosecutor may initiate an investigation on the basis of reliable information from victims, non-governmental organizations, or any other trustworthy individuals or sources. These last two methods comprise the second track.

The ICC is prospective in nature, capable only of taking cases involving crimes committed after it entered into force on 1 July 2002.⁴⁹ The Court's jurisdiction is anchored on the “universal jurisdiction” concept;⁵⁰ however, Article 12 of the Statute imposes certain preconditions on the Court's exercise of that jurisdiction when not addressing a UNSC referral. For matters referred by a state party or the Prosecutor, the Court has jurisdiction if either the state on whose territory the conduct occurred, or the state of nationality of the person accused, is a party to the Statute, or voluntarily consents to the Court's jurisdiction.⁵¹ Moreover, unless the UNSC refers the matter, the Court's jurisdiction is complementary to that of state (domestic) courts—that is, the Court will find a case admissible and will prosecute *only* if the state is either genuinely unwilling or unable to prosecute.⁵² The intent is for the ICC to serve as a “court of last resort,” designed to complement national systems of justice, not divest them of authority.⁵³

Crimes. With the benefit of hindsight, the Rome Statute has compiled a comprehensive list of crimes.⁵⁴ The Statute explicitly provides the Court with jurisdiction over genocide,⁵⁵ crimes against humanity,⁵⁶ war crimes,⁵⁷ and crimes of aggression—but as the Conference was unable to agree on the definition of “aggression,” and the matter has yet to be resolved, the Court will not exercise jurisdiction over such crimes until adequately defined.⁵⁸

Current Operations. As of 30 March 2007, four principal cases have been referred to the ICC since its inception⁵⁹—three by a state party involving war crimes and one by the UNSC involving crimes against humanity in Darfur.⁶⁰ The Democratic Republic of the Congo (DRC), the Republic of Uganda, and the Central African Republic (CAR) have all referred cases, two of which are still active.⁶¹ In 2004, the ICC commenced its first investigations, looking into alleged

crimes in the DRC and Northern Uganda,⁶² and issued its first arrest warrants in 2005, for five leaders of the Lord's Resistance Army in Uganda, accused of provoking and directing over twenty years of conflict.⁶³ In 2006, the Court opened up an investigation concerning Darfur,⁶⁴ which, given Sudan's status as a non-ICC party and unwillingness to consent to the Court's jurisdiction, would not have happened without the UNSC referral.⁶⁵

The US Objections to the International Court, and an Analysis

On the eve of the Rome Conference, both President Clinton and many in Congress favored creating the ICC, just as the US had championed the *ad hoc* war crimes tribunals of the 1990s.⁶⁶ Admittedly, the US supported the *ad hoc* courts not just because of the lofty goals they served in terms of world justice, but because their jurisdiction was determined by the UNSC, over which the US had a measure of control, lessening the risk to US personnel.⁶⁷ Although these tribunals worked well, having three of them in operation at one time, with others under consideration, caused the UNSC to experience "Tribunal Fatigue."⁶⁸ The process of establishing a tribunal was extremely time, money, and resource-intensive and, as such, "China and the other Permanent Members of the Security Council let it be known that this would be the last of the UNSC-established *ad hoc* tribunals."⁶⁹ The lack of a permanent system to investigate and prosecute, coupled with an increase in devastating conflicts, meant the momentum for a permanent court intensified, with near unanimous UN support. This momentum led straight to Rome.

In Rome, the US was a vital and energetic participant. Yet at the end of the conference, the US voted against adopting the treaty, and, although President Clinton eventually signed the treaty,⁷⁰ he simultaneously declared that the US had "deep reservations" about the Statute's "fundamental flaws."⁷¹ President Bush then echoed those concerns as the US delivered to the UN both its intention to *not* ratify the Statute and formal renouncement of any US obligations under the Statute.⁷² As such, the US now stands as the only NATO member, along with Turkey, to not join the Court, and the only democracy in the world to actively oppose it⁷³—something that does not sit well with EU countries, all of whom support the ICC, or the many other ICC proponents.⁷⁴

At the core of US opposition is a "fear that other nations will use the ICC as a political forum to challenge actions deemed legitimate by responsible governments."⁷⁵ In essence, the US is concerned that the Court might assert jurisdiction over US servicemembers charged with war crimes arising out of a legitimate use of force, or over US civilian leaders in making policy decisions, regardless of whether the US is a party to the Statute.⁷⁶ In Rome, the US sought an

exemption from the Court's jurisdiction over these individuals, "based on the unique position the US occupies with regard to international peacekeeping."⁷⁷ What it received was almost everything it asked for, except what, in essence, was an "iron-clad veto of jurisdiction over US personnel."⁷⁸ As such, the US felt obligated to oppose the Court, and what follow are the major US objections to the Court and an analysis of each:

Jurisdiction. The ICC asserts jurisdiction over certain crimes committed in a state-party's territory, even if committed by non-party nationals. The impetus for the Court's more expansive reach was to ensure that it could assert jurisdiction over "rogue regimes," which would otherwise protect themselves simply by refusing to ratify the Statute, subverting the Court's primary purpose.⁷⁹ Yet notwithstanding this very reasonable rationale, the US objects to this exercise of jurisdiction, because in casting this broad net, the Statute caught more than just rogue nations, it caught the US.⁸⁰ However, as the US is a party to treaties from which the Statute derived its definitions of crimes, US nationals are already subject to crimes over which the Court will have jurisdiction.⁸¹ The US claims that the ICC's jurisdiction infringes on US sovereignty, as the threat of prosecution may inhibit the conduct of US foreign policy. But as one legal scholar notes, "Sovereignty does not provide a basis for exclusive jurisdiction over crimes committed by a State's nationals in a foreign country. Nor does a foreign indictment of a State's nationals for acts committed in a foreign country constitute an impermissible intervention in the State's internal affairs."⁸² Finally, the Statute intended to address the US concern through complementary jurisdiction.

Complementarity/"Politicized" Prosecution. Based on the ICC's construct, the US alleges that some nations may use the Court to refer "trumped-up" charges against the US, whose exposure is significantly greater than most due to its prominent role in international matters. Yet under the Statute, the Court must defer to national prosecution unless it finds that nation "unwilling or unable" to effect such prosecution. The US fears that granting the Court this discretion will allow it to examine and potentially reject a sovereign state's decision not to prosecute, or the state's court decision not to convict.⁸³ In response, Court proponents initially bristle at the notion that the US is more susceptible to political maneuvering, especially when many nations contribute significant forces to peacekeeping operations and willingly subject them to the Court's jurisdiction, unlike the US.

ICC supporters also view the US claim as greatly exaggerated. With the following procedural protections built into the Statute, the belief is that the Court is not likely to experience success in any "politicized" prosecutions. First, the Prosecutor must receive authorization from the Pre-Trial Chamber to initiate any investigation on a matter not referred by the UNSC or a

state party, which decision may be appealed to the Appeals Chamber.⁸⁴ Second, the Prosecutor must notify all states, with an interest in prosecuting a case, of the Court's intent to investigate. A state then has one month to notify the Court that it will investigate—a decision to which the Prosecutor must defer, unless he can convince the Pre-Trial Chamber that the state's actions are not genuine, which decision may again be appealed.⁸⁵ Third, the Statute raises the threshold for cases the Court may address, giving it jurisdiction over only those “grave” breaches executed as part of a “plan or policy or largescale commission of such crimes.”⁸⁶ Last, the UNSC has authority under the Statute to defer, via a resolution, any investigation or prosecution for 12 months, on a renewable basis.⁸⁷ Additionally, with the benefit of hindsight, the US may now review the Court's first four-plus years as a gauge of any inclination to make decisions for purposes contrary to the Court's intent—and it will observe none. Instead, it will see a Prosecutor who declined to investigate allegations concerning the conduct of US personnel in Iraq,⁸⁸ despite multiple submissions (240) by public and private entities forcefully urging him to take action against the US—the essence of political persuasion.⁸⁹ This obviously bodes well for the institution's credibility as a whole, and the Prosecutor in particular, as one not willing to bow to pressure, especially when the tide of public opinion—to include that within the US—has turned significantly against US action in Iraq.

Overzealous or “Politicized” Prosecutor. Tied to the prior objection, the US believes that the Prosecutor, however well-intentioned the individual may be, is ripe for “politicized prosecutions” because his decisions and actions are at his own unchecked discretion. However, this argument also holds little sway. As previously detailed, the Prosecutor is bound to seek permission from the Pre-Trial Chamber for any self-initiated investigation, and that decision is subject to an interlocutory appeal to the Appeals Chamber. The Prosecutor is also subject to removal on vote by the Assembly for cause. Clearly, the Conference was attempting to again strike that delicate balance between enough independence and power, absent political (UNSC) control—on both Prosecutors and judges—to obtain a fair outcome, with the risk posed by an overzealous Prosecutor. At Rome, the US attempted to obtain a UNSC check on the Prosecutor. Yet most nations perceived the UNSC as being just as politicized, if not more, such as to cause the typical type of stalemate and impunity that frequently occurs in these cases. Finally, as set forth above, almost five years of experience with the Court, and four with this Prosecutor, has demonstrated no evidence whatsoever of any willingness to politicize his decisions.⁹⁰

Constitutional/Lack of Due Process. The US argues that the Court will not afford US personnel due process rights guaranteed under the US Constitution, such as the right to a jury

trial. However, the Statute actually provides a very comprehensive array of procedural safeguards—negotiated by DOJ representatives in Rome—that track the Bill of Rights.⁹¹ The DOJ’s Office of Legal Counsel also opined that US ratification of the Statute, and surrender of US nationals for ICC prosecution, would not violate any provisions of the Bill of Rights, nor Article III, of the Constitution. Moreover, there are any number of instances in which US nationals do not receive all US procedural protections—overseas trials by foreign governments, military courts-martial (bench trials), and *ad hoc* international tribunals (ICTY). Finally, with the current US policy on GWOT military tribunals, such US claims may lead to accusations that the US is applying a double standard.⁹²

Aggression/Usurping the UNSC’s Role. Finally, the US contends that the Statute’s granting the Court authority to define and punish “aggression” usurps the UNSC’s role as specified in the UN Charter.⁹³ The US fears that the Court may ultimately divest the UNSC of its prerogative in determining whether an act of aggression has actually occurred—such as in cases like the US intervention in Iraq. Crimes of aggression—formerly referred to as “crimes against peace”—are within the Court’s jurisdiction, but are not yet defined. The Statute calls for an amendment to eventually define aggression and specify conditions for the Court’s exercise of jurisdiction.⁹⁴ Thus, all parties will debate and then vote on the definition. Of course, as the US is *not* a party, it will *not* have the opportunity to cast its vote. Moreover, Article 5 requires that any definition and jurisdictional conditions be consistent with the UN Charter’s provisions. As a UNSC Permanent Member, the US has more than ample influence to ensure that the ICC’s eventual definition and conditions so comply. As long as the ICC language requires a UNSC determination that a crime of aggression has occurred, then the UNSC obviously retains its prerogative.⁹⁵

These five topics comprise the most significant US objections to the Rome Statute and the ICC and, as demonstrated, none are irresolvable. Like any new institution, there are certain unknowns that will only become “known” to the US through time, experience, effort, and a cooperative working relationship with the Court.

The US Response to the International Criminal Court, and an Analysis⁹⁶

A person stands a better chance of being tried and judged for killing one human being than for killing 100,000.⁹⁷

Having failed to obtain the “iron-clad veto” of ICC jurisdiction which it sought at Rome, the US turned to other methods to lessen the Court’s impact on US personnel—namely, the

American Servicemembers' Protection Act (ASPA), Article 98 Agreements, and restrictions on peacekeeping operations,⁹⁸ described and analyzed below.

*ASPA.*⁹⁹ Once President Clinton signed the Rome Treaty on 31 December 2000, congressional ICC opponents launched into high gear to pass legislation aimed at reduced US cooperation with the Court.¹⁰⁰ The result was the ASPA, signed into law just one month after the ICC officially opened. The Act effectively prohibits US cooperation with the ICC,¹⁰¹ cuts off certain military assistance to countries that are a party to the Statute,¹⁰² regulates US participation in UN peacekeeping operations,¹⁰³ and authorizes POTUS to “use all means necessary to bring about the release” of US and/or Allied personnel detained by the Court.¹⁰⁴ With the ASPA, Congress made its intent to undermine the Court’s efforts abundantly clear.

Article 98 Agreements. The US also actively promoted agreements with various countries, under Article 98 of the Statute, to protect American personnel from ICC prosecution.¹⁰⁵ To sign such “deals” means US restrictions on military assistance no longer apply.¹⁰⁶ These bilateral accords certify that neither party will arrest, extradite, or otherwise surrender the other’s personnel to the Court. The US has sought these pacts with both party and non-party nations, and has signed over 100 to date.¹⁰⁷ However, many Court supporters view the use of Article 98 in this manner as an inappropriate interpretation and expansion of the provision, primarily intended to cover SOFAs and SOMAs.¹⁰⁸ The US responded to this criticism by enacting the Nethercutt Amendment which, like the ASPA, prevented additional funding—direct economic support—to party states that have not signed a bilateral agreement.¹⁰⁹

Restrictions on UN Peacekeeping Operations. One of the US primary concerns with the Court’s expansive reach centered on US forces serving in peacekeeping operations.¹¹⁰ As noted, the ASPA prohibits US participation in these missions unless no risk of prosecution exists.¹¹¹ So significant was this concern, in July 2002 the US vetoed an extension of the mandate for the UN mission in Bosnia over the lack of protection from ICC prosecution for US forces. To resolve the crisis and continue the mission, the UNSC relented, granting immunity from prosecution for one year under Article 16, and renewed it for a second.¹¹² Subsequent UN missions have created the same concern. US forces participated in the UN Mission in Liberia in 2003 because the UNSC granted all personnel from non-party states permanent immunity from the Court regarding acts tied to the mission.¹¹³ Similarly, US forces participated in the UN Stabilization Mission in Haiti in 2004 based on a US-Haiti Article 98 Agreement.¹¹⁴ Not surprisingly, the international community became frustrated with, and opposed to, US actions in threatening to impede peacekeeping missions, broadening the intent of Article 16, and circumventing the Court’s purpose at every turn. Perhaps UN Assistant Secretary-General John

Ruggie captured this sentiment best in stating: “The problem here is not US opposition to the ICC, but that UN peacekeeping has been hijacked as a tool to express America’s opposition to the ICC.”¹¹⁵

The US response, with its harsh restrictions on assistance, participation, and cooperation, clearly added a “coercive element” to the US policy and relationship—or lack thereof—with the Court. US efforts, while successful only in minor respects (to US ICC critics), have created significant worldwide resistance.¹¹⁶ Moreover, they have had many unintended consequences for the US with very little benefit. Initially, the prohibition on military and economic assistance to party states lacking a bilateral agreement negatively affects US Theater Security Cooperation Programs—that is, its engagement strategies focused on alliances and partnerships through education, training, military sales/service, and direct aid.¹¹⁷ Second, the insensitive and oppressive bilateral agreements are not a fail safe—they do not provide immunity from prosecution and cover a limited number of nations.¹¹⁸ Additionally, revoking US cooperation and assistance does little to impact the Court’s affect on America, but greatly impacts the overall perception, if not reality, of the ICC’s ability to operate effectively.¹¹⁹ Simultaneously, the *negative* perception of the US created through its failure to ratify the Statute—or strenuous opposition to, and efforts to undermine, the Court—is significant, and demonstrates that the US has yet to master the art of strategic communications (SC),¹²⁰ preventing it from effectively utilizing the global information environment to its advantage.¹²¹

The perception of the US internationally is negative, at best. Aptly stated, America has a “serious image problem,”¹²² as world opinion has declined substantially in recent years,¹²³ evidenced by the current anti-US protests in Latin America or President Putin’s latest tirade.¹²⁴ Based on the messages the US conveys, it is viewed as the “neighborhood bully”—“arrogant, hypocritical, self-absorbed/indulgent, and contemptuous of others”¹²⁵—with whom other nations frequently do not associate. The result is an inability to foster accord and form the necessary coalitions to address regional and international issues. This leaves the US to essentially “go it alone,” making it difficult to claim legitimacy for US military force and more challenging to maintain support for operations abroad—domestic or international.¹²⁶ American public and congressional support for operations in Iraq has slipped to an all-time low.¹²⁷ International support, never particularly strong, has been whittled down to a few staunch allies,¹²⁸ and even they now look for cover. The bottom line is that “if [US] strategic communications ...don’t improve...disastrous consequences will follow.”¹²⁹ The US position on the ICC is certainly not aiding the cause.

Knowing all this, the US must focus on selecting proper “audiences, messages, and means” to have “direct strategic implications.”¹³⁰ In short, what message/image will the US convey to the world regarding the Court? That the US is an “isolated, arrogant, parochial, and hypocritical bully,” reluctant to be held accountable to the standard established for the rest of the world?¹³¹ Will it risk losing the moral high ground and damaging its influence worldwide, even more than it has? The answer, I believe, is clear. The US is a world leader on human rights, justice, and the rule of law, yet its current ICC position—advocating a double standard—runs counter to all that America represents, harming its reputation.¹³² The position is inconsistent with US values, interests, and institutions; its commitment to end impunity; and the many principles and policies set forth in the national security and defense strategies concerning effective cooperative action, alliances, and partnerships—all focused on “establishing conditions conducive to a favorable international system.”¹³³ As such, the US must reverse its ICC policy to send the proper strategic communication to the world and regain its status as the vanguard in the quest for international justice.

Recommendations

It is common sense to take a method and try it. If it fails, admit it frankly and try another. But above all, try something.

—Franklin Delano Roosevelt¹³⁴

The US approach to the ICC—that of hostile outsider—is not succeeding. Since Rome, this method has engendered only ill-will toward the US with absolutely no statutory compromises. Alternatively, the US should follow FDR’s wise counsel to “admit failure frankly and try another method.” It must now become an *influential insider*—that is, ratify the Statute or, at minimum, engage and cooperate with the Court to resolve any differences and to move forward in the greater context of enhancing the Court’s overall effectiveness. Contrary to America’s initial belief, the Court is a *fait accompli* and, as such, the US must “get on board.” Ratifying should not be viewed as capitulation but, instead, as a recognition that the US may actually gain more by working with the Court than against it, as detailed above and in the following paragraphs. Moreover, it can accomplish this even while significantly limiting the exposure of US nationals, which is its primary stated concern.

Jurisdiction. As the Statute grants the Court jurisdiction regardless of whether a state is a party to the Statute, the US actually gains little benefit, but suffers significant loss, by remaining a non-party. As US personnel are unlikely to engage in genocide or crimes against humanity, the primary concern involves war crimes allegations.¹³⁵ Under Article 124, however, a ratifying

state may "opt out" of the Court's jurisdiction for war crimes for a period of seven years after such ratification.¹³⁶ The US can use that period to engage the Assembly over potential amendments to the Statute, making it more palatable to the US, while its personnel will not be subject to the risks they are now as a non-party. After six years, if the US is unable to obtain satisfactory compromises, under Article 127 it may withdraw from the Statute.¹³⁷ Additionally, through ratifying the US gains the right to participate completely in the Assembly and to vote on all critical issues, such as electing—or removing—Judges and Prosecutors; referring crimes to the Prosecutor for investigation, and defining crimes, such as aggression¹³⁸—all critical elements of influence and control.

Justice. The Court represents justice for victims and perpetrators alike. It is a "forum for honoring the memory of those lost, as well as punishing those responsible,"¹³⁹ and signifies a moral commitment to human rights—all substantial US interests. Victims and families confront abusers, accused are justly tried and criminals punished, and societies re-establish the rule of law—all through the Court—while it also serves to deter potential war criminals.¹⁴⁰

Mutual Need. Because the Court advances American interests in promoting and developing international law and justice, the Court deserves US support. While the US can significantly assist the Court—offering increased authority, prestige, personnel, intelligence, funding, and more¹⁴¹—the Court will provide the US with moral legitimacy, enhancing its damaged reputation. Accordingly, the US needs the Court as much as the Court needs the US.

Ultimately, a balancing test applies, in which the US attempts to strike that delicate balance between national interests and global concerns. How much perceived sovereignty will the US sacrifice to strengthen the global rule of law? Will it place the needs of the many over the wants of the very few?¹⁴² As one noted scholar comments:

While the world is grateful for the US role in the preservation of peace and will not target it with unwarranted efforts to prosecute its personnel, neither will it give it *carte blanche* to conduct military operations without submitting to the same standards to which the US holds all others accountable. *The problem is not with the Court, but with the US double standard.*¹⁴³

The US is at last beginning to acknowledge that it will not lead the world through military power alone; its recent actions on Darfur and ASPA provide optimism.¹⁴⁴ Instead, it must provide moral leadership and support to the newly-formed global justice structure that is the ICC.

Finally, regardless of whether the US ratifies the Statute or adopts a policy of cooperation, it must ensure that it accomplishes the following:

Strengthen US Law. The US must identify any disparity between crimes within the Court's jurisdiction and existing US law and immediately seek to eliminate these differences through

legislation designed to expand US Federal court jurisdiction to cover all relevant offenses, to better shield US personnel from the Court's reach.¹⁴⁵

Investigate all Allegations. The US should initiate procedures through policy changes to mandate a thorough investigation of all war crimes allegations and, if justified, prosecution of all crimes that fall within the ICC's jurisdiction.¹⁴⁶ Coupled with the recommendation to implement changes to the law to cover all ICC crimes, the US will effectively preempt the Court's jurisdiction based on the Statute's complementarity.¹⁴⁷

Consider Consequences. The converse of US cooperation and engagement is the status quo of hostility, unilateralism, and isolationism. This means continued restrictions on peacekeeping missions and denial of aid to allies and partners, which engenders a corresponding harm to relationships, TSC strategy, military operations, the security environment, and ultimately US foreign policy and strategy. The US must contemplate these consequences when evaluating its relationship with the Court.

Conclusion

Who still talks today about the Armenians?¹⁴⁸

Hitler, noting well the world's tepid response to the Turk's genocidal campaign at the dawn of WWI, spoke these words as he launched his "Death's Head Units" into Poland in 1939 to "kill without pity or mercy all men, women, and children of Polish race or language."¹⁴⁹ The world needs no better proof that, left unchecked, men whose "capacity for evil knows no limits" will continue to inflict suffering and death on the weak and defenseless until the world community intercedes to end the "assaults on mankind." These crimes, as Kofi Annan reminds us, are no longer remnants of the past, but are "of our time...heinous realities that call for a historic response."

Today, the world finally has that historic response—found in the united efforts of the international community to hold the guilty accountable—through the effective operation of the ICC. The Court—with its perceived imperfections—is an institution that clearly advances US interests and affirms US ideals in promoting human rights, justice, and the rule of law. As such, strenuous US opposition to the Court is at times mystifying, and contradicts all US duties and moral obligations. Ambassador Scheffer accurately portrayed the responsibility of the most powerful nation committed to the rule of law to confront such assaults:

One response mechanism is accountability, namely to help bring the perpetrators of genocide, crimes against humanity, and war crimes to justice. If we allow them to act with impunity, then we will only be inviting a perpetuation of these crimes far into the next millennium. Our legacy must demonstrate an unyielding commitment to the pursuit of justice.¹⁵⁰

These are powerful words from a nation long dedicated to the preservation of humanity. But are these just words on paper, or do they hold real meaning? They ring hollow when taken in the context of the US response to the ICC's formation. Yet should the US finally ratify the Statute and become an integral member of the Court, they will again obtain their true significance. The world seeks a permanent, effective, and politically uncompromised system of international justice. With US cooperation and support—as an *influential insider*—this system can become a reality, and “only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished accordingly.”¹⁵¹

Endnotes

¹ David J. Scheffer, Ambassador-at-Large for War Crimes Issues, United States Department of State, *Address on the 50th Anniversary of the Universal Declaration of Human Rights*, Ramapo College, Mahwah, NJ, 16 September 1998. Ambassador Scheffer also served as the principal United States (US) representative to the 1998 United Nations (UN) conference that was to consider the establishment of an international criminal court.

² Winston Churchill, once the full horror of the concentration camps and extermination policies of Nazi Germany became known to the public, called it “a crime with no name.” Alain Destexhe, *Rwanda and Genocide in the Twentieth Century* (New York: New York University Press, 1995), 1 (cited in Frontline Special Report, *The Crime of Genocide*, available from <http://www.pbs.org/wgbh/pages/frontline/shows/rwanda/reports/dsetexhe.html>; Internet; accessed 20 February 2007). “History was of little use in finding a recognized word to fit the nature of the crime.... There simply were no precedents in regard to either the nature or the degree of the crime.” Ibid. Raphael Lemkin, a Polish-born adviser to the US War Department, in his book, *Axis Rule in Occupied Europe: Laws of Occupation-Analysis of Government-Proposals for Redress*, actually coined the term “genocide,” which he derived from the Greek word for “race/tribe”—“Genos”—and the Latin suffix “cide,” which means “to kill.” Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation-Analysis of Government-Proposals for Redress* (Washington, D.C.: Carnegie Endowment for International Peace, 1944), 79-95 (cited in Destexhe, 1-2). Lemkin actually defines the term as “the destruction of a nation or of an ethnic group, through the existence of a coordinated plan, aimed at total extermination, to be put into effect against individuals chosen as victims purely, simply and exclusively because they are members of the target group.” Ibid.; Destexhe, 1-3. The United Nations, dating back to December, 1948, defines genocide as “any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, whether committed in time of peace or time of war:

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

- d) Imposing measures intended to prevent births within the group;
- e) Forcibly transferring children of the group to another group.

Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature 11 December 1948, art 2., 78 U.N.T.S. 277 (entered into force 12 January 1951) [hereinafter Genocide Convention]. This same definition has been used in the 1993 Statute of the International Criminal Tribunal for Yugoslavia (ICTY) and the 1994 Statute of the International Criminal Tribunal on Rwanda (ICTR), and is consistent with the definition of genocide contained within the Rome Statute of the International Criminal Court (ICC).

³ “Despite its recurrence, ethnic cleansing nonetheless defies easy definition. At one end it is virtually indistinguishable from forced emigration and population exchange while at the other it merges with deportation and genocide. At the most general level, however, ethnic cleansing can be understood as the expulsion of an “undesirable” population from a given territory due to religious or ethnic discrimination, political, strategic or ideological considerations, or a combination of these.” Andrew Bell-Fialkoff, “A Brief History of Ethnic Cleansing,” *Foreign Affairs* (Summer 1993): 1, available from <http://www.foreignaffairs.org>; Internet; accessed 22 February 2007. Serb attempts to drive Bosnian Muslims out of towns all through the Balkans “have only recently lodged ethnic cleansing in the public mind. But in the annals of history such atrocities are far from new.” Ibid. The US State Department includes the following *systematic* actions within what it considers to be ethnic cleansing:

- Forcible displacement/expulsion of civilians;
- Looting of homes and businesses;
- Widespread burning of homes;
- Use of civilians as human shields;
- Detentions;
- Summary Executions;
- Rape;
- Attacking medical facilities;
- Identity cleansing.

U.S. State Department, *Ethnic Cleansing in Kosovo: An Accounting* (Washington, DC: U.S. State Department, December 1999), 2-3, available from http://www.state.gov/www/global/uman_rights/kosovoii/homepage.html; Internet; accessed on 22 February 2007 (a report prepared by the US State Department with the express intent to “document the extent of human rights and humanitarian law violations in Kosovo, and to convey the size and scope of the Kosovo conflict.”).

⁴ The term “crimes against humanity” has been generally described as “[a] collective category of major inhumane acts committed against any (internal or alien) civilian population before or during the war.” *International Military Tribunal, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* (1950), 9-16. The definition of the term first used internationally appeared in Article 6(c) of the 1945 London Charter of the International Military Tribunal (signed by the US, USSR, France and Britain), which was used in the trial of German war criminals in Nuremburg beginning in 1945:

Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war, or persecutions on political, racial, or religious grounds

in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Charter of the International Military Tribunal, art 6. annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, London, Aug. 8, 1945, 82 U.N.T.S. 279, 59 Stat 1544, 3 Bevans 1239 [hereinafter London Charter, annexed to the London Agreement]. The Charter was the first time that crimes against humanity were established. The International Military Tribunal for the Far East (Tokyo) followed suit, as did the international tribunals for Yugoslavia and Rwanda. The definition has been expanded in those tribunals to cover rape and torture. M. Cherif Bassiouni, "Crimes Against Humanity," *Crimes of War: The Book*, available from <http://www.crimesofwar.org>; Internet; accessed 13 March 2007. Crimes against humanity actually overlap with the definitions of war crimes and genocide. They are distinguishable from war crimes in that it is not required that they occur in time of war, and from genocide in that there is no requirement for an intent to destroy "in whole or in part" a specific group of people. Ibid., 2. See also Dr. Yoram Dinstein, *Crimes Against Humanity and the Rome Statute of the International Criminal Court*, lecture, Science Center North-Rhine-Westphalia, Germany, 27 November 2005.

⁵ War crimes are defined in Article 147 of the Fourth Geneva Convention as the, "Wilful killing, torture, or inhuman treatment, including....wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile power, or willfully depriving a protected person of the rights of fair and regular trial...taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly." Geneva Convention Relative to the Protection of Civilians in Time of War, August 12, 1949, art. 147, 6 U.S.T. 3516, 75 U.N.T.S. 287. In short, Army Field Manual 27-10 captures the essence of a war crime well: "The term 'war crime' is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime." U.S. Department of the Army, *The Law of Land Warfare*, Field Manual 27-10 (Washington, D.C.:U.S. Department of the Army, 15 July 1976), 178 (para. 499) [hereinafter FM 27-10].

⁶ General estimates indicate that since the end of World War II, in more than 250 conflicts, anywhere from 70 to 170 million people have been killed.

⁷ The British Army in South Africa, experiencing significant difficulty in overcoming the guerilla tactics used by the Boers, resorted to a "scorched-earth policy," denying everything of sustenance to the Boers, including woman and children and, in so doing, uprooted a whole nation. Stanford University Libraries and Academic Information Resources (SULAIR), *Concentration Camps During the South African/Boer War, 1899-1902*, 1-6, available from <http://cgi.stanford.edu/dept/SUL/library/cgi-bin/sulair.htm>; Internet; accessed 4 March 2007. Lord Kitchener, Commander-in-Chief of the British Army in South Africa, ordered systematic "sweeps" of the countryside, burning farms, destroying homes, stealing food, and creating tens of thousands of refugees. Kitchener also ordered all Boer women and children into British "concentration camps," where they were greeted with neglect, suffering, and death. "The British Army, unable to defeat the Boers using conventional tactics, adopts many of the Boer methods, and the war degenerates into a devastating and cruel struggle between British righteous might and Boer nationalist desperation. The British crisscross the countryside...to flush the Boers into the open; they burn farms and confiscate foodstuffs...and they pack off Boer women and

children to concentration camps as “collaborators.” *The Boer War: South Africa, 1899-1902*, 1-2, available from <http://www.geocities.com/boerwar.html>; Internet; accessed 4 March 2007.

⁸ The “Young Turks” perpetrated the Armenian Genocide in Turkey (what was known as the Ottoman Empire) from late 1914 through the end of World War I. A triumvirate of young military officers, the Young Turks represented a growing discontent in the early 1900s over the direction in which their country was headed under the absolutist rule of Sultan Abdul-Hamid. At the apex of the Young Turk Revolution was the Committee of Union and Progress, which promoted a Turkish nationalism “xenophobic and exclusionary” in nature. In January 1913, the Union and the triumvirate seized control of Turkey in a coup d’etat. Rouben Paul Adalian, Armenian National Institute, *Young Turks and the Armenian Genocide*, 1-3, available from http://www.armenian-genocide.org/young_turks.html; Internet; accessed 4 March 2007.

The advent of World War I, in which this new Turkish government joined with the Central Powers (Germany in particular), provided an opportunity for Turkey to solve the “Armenian question.” United Human Rights Council, *20th Century Genocides: Armenian Genocide, 1915-1918*, 1-10, available from http://www.unitedhumanrights.org/Genocide/_rmenian_genocide.htm; Internet; accessed 19 February 2007 [hereinafter *Armenian Genocide*]. In an effort to seize control of more land, and power, and consolidate Turkish rule, especially in lands held by Iran and Russia, the Union conceived a clandestine program to exterminate the Armenians. Adalian, 1-2. Acting under cover of war preparations, the Young Turks secretly ordered the mass arrest of Armenians throughout Turkey. The Armenian men were rousted from their homes, jailed, tortured, and then shot or bayoneted and left for dead on the outskirts of towns and cities. The women and children were deported, forced to undertake grueling and horrific “death marches” into the Turkish mountains and Syrian desert, where they were attacked, raped, tortured, and either shot, burned alive, drowned, thrown off of cliffs, or left for dead. What is now known as the “Armenian Genocide” took the lives of an estimated 2,000,000 people—men, women, and children. This represented almost 80% of the Armenian population. *Armenian Genocide*, 6-8. The US Ambassador to Turkey in 1918, Henry Morgenthau, reportedly advised the Administration that, “When the Turkish authorities gave the orders for these deportations, they were merely giving the death warrant to a whole race.” *Ibid.*, 7. At the end of the war, the Young Turk triumvirate escaped to Germany and Italy, countries which granted them asylum. Extensive efforts to obtain their return to stand trial for their crimes were to no avail and, ultimately, they were assassinated by Armenian activists in 1921 and 1922. *Ibid.*, 8-9; Adalian, 2.

⁹ “It would take many years for the whole story of the moral cost of the war to appear, but one vivid sign of it – and of what had been overcome – became immediately and horrifyingly visible as the allied Armies advanced into Germany and Central Europe. They found themselves overrunning camps where sadistic brutality and callous neglect had gone further than anyone had yet conceived....The majority of those who had suffered were Jews condemned to inhuman treatment and death simply because of their race. The Nazis had made special efforts to wipe out those they deemed genetically undesirable. In the case of the Jews they had spoken glibly of a ‘Final Solution’ to a Jewish ‘problem.’ Rightly, the word ‘Holocaust’ has been given to what they did. Full figures may never accurately be known, but five, six million Jews perished, whether in gas chambers of extermination camps, or in factories and quarries where they died of exhaustion and starvation, or in the field where they were rounded up and shot by special extermination detachments.” J.M. Roberts, *A Short History of the World* (New York: Oxford University Press, 1993), 462-63.

WWII also resulted in what is referred to as the “Malmedy Massacre” in 1944, in which German soldiers—Waffen SS, a regiment of the 1st SS Panzer Division, commanded by LTC Jochen Peiper—operating under a concept called *Kriegsraison* (the doctrine of military necessity that justifies not only what is necessary to win, but also what is necessary to reduce the risks of losing, or simply to reduce losses or the likelihood of losses in war), killed 81 unarmed US Prisoners of War (POW) from B Battery, 285th Field Artillery Observation Battalion, near the Belgian village of Malmedy. Once gathered in an open field, the SS troopers raked the American POW with machine-gun and pistol fire, until all victims fell dead or wounded into the snow. Survivors were identified by English speaking SS who walked among the wounded asking if anyone needed medical attention. Once identified, the SS murdered the survivors by a pistol shot to the back of the head, at close range. Three survivors actually lived to tell of the massacre, and the bodies of the 81 soldiers killed were subsequently located, identified, and examined. All available evidence appeared to substantiate the allegations. The German forces contended that such killing was permissible because the Germans were unable to provide food, water, and shelter for the POW, and retaining them would have jeopardized the German operation. Nevertheless, various German soldiers were subsequently tried by a US Military Tribunal at Dachau in 1946, but any sentences obtained were either commuted or reduced, and the SS men were eventually released. International and Operational Law Department, The Judge Advocate General’s School, U.S. Army, *Law of War Handbook*, JA 423, 2005 ed., at 165; The History Place: World War II in Europe, *The Malmedy Massacre*, 1-3, available from <http://www.historyplace.com/worldwar2/timeline/malmedy.htm>; Internet; accessed 22 February 2007; see also Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York, NY: Basic Books Inc., 1977), 144.

¹⁰ The Japanese Imperial Army was implicated in countless instances of war crimes and crimes against humanity in WWII. The atrocities committed by Japanese troops were widespread, and included almost every type of torture, deprivation, and death imaginable. China, Russia, the US, the UK, Australia, France, the Philippines, Thailand, Burma, Vietnam—no country or its personnel escaped the horror, pain, and suffering inflicted by the Japanese Army. Names like the Bataan Death March, the BurmaSiam railroad (the “River Kwai”), the bombing of Manila, and the Nanking Massacre or “Rape of Nanking” became synonymous with, and representative of, the Japanese Imperial Army and its treatment of others. Members of the *Kempeitai*, the Japanese secret police, known for its violence and cruelty, murdered victims through beatings, beheadings, and poisonings. Records from a Japanese entity named Unit 731, a bacteriological and chemical warfare unit, demonstrated that unit members had used POWs and civilians for horrifying medical experiments, such as injecting live patients with bacteria to monitor results, or applying tourniquets to limbs for hours, sending the victims into shock. Others engaged in vivisection, where live patients underwent medical experiments while awake and coherent—such as dissecting and removing various organs. In the Philippines, “Once the war had ended, details of the last hideous days...began to see the light of day. For three weeks, the Commission heard ghastly details of slaughter and rape, of beheadings and of those burned alive, of torture and wanton destruction, of the murders of the helpless—women and babies and priests and American prisoners of war.” Robert Barr Smith, “Japanese War Crimes Trials,” in *World War II* (September 1996), 1, available from http://www.historynet.com/agazines/world_war_2/3035796.html; Internet; accessed 4 March 2007.

Additionally, in what many consider to be the opening of the Second World War in the Pacific in 1937, the Japanese committed what subsequently became known as “The Rape of Nanking.” United Human Rights Council, *20th Century Genocides: Nanking Massacre*, 1, available from http://www.unitedhumanrights.org/Genocide/nanking_massacre.htm; Internet;

accessed 19 February 2007 [hereinafter *Nanking Massacre*]. In December 1937, after the Imperial Army had resumed its attacks on China, beginning an eight-year struggle—what Japan referred to as “the China incident”—Japanese forces became mired in a fierce battle with Chinese soldiers in Shanghai. J.M. Roberts, 448-49. Incensed over the difficulties encountered there, the Imperial Army thereafter marched into Nanking looking for revenge. The carnage that followed was later described by Western aid workers as “hell on earth.” *Nanking Massacre*, 4. Both film and photographic evidence produced by the Japanese themselves documented the widespread torture, rape, degradation, and killing by every conceivable means of the soldiers and civilians of Nanking. Only the intervention by incredibly courageous American and European aid workers prevented the death toll from doubling. *Ibid.*, 4. Unfortunately, leaders in both America and Britain were becoming so increasingly concerned with Hitler’s threats and actions in Europe—rearming and reoccupying the Rhineland—that they failed to adequately inquire about, and respond to, the horrific stories emanating from China. Only much later were the stories confirmed by the West. *Ibid.*; Roberts, 455. In the end, over 300,000—half the Nanking population—had been murdered.

¹¹ The incident in a commune named My Lai is commonly regarded as one of the most barbaric and well-publicized war crimes arising out of the Vietnam War. “The villages of central Vietnam known collectively as My Lai have been stamped by history as places of horrific acts of war. More than 500 people, many of them women and children, were slaughtered there by American G.I.s on March 16, 1968. They were ordered out of their homes, lined up in ditches and shot. Soldiers tossed hand grenades into their bunkers and torched their thatched huts.” Tim Larimer, “Echoes of My Lai,” *Time*, 16 March 1998, Vol. 151, No. 10, available from <http://www.time.com/time/magazine/1998/int/980316/vietnam.html>; Internet; accessed 3 March 2007; “Men in American uniforms slaughtered the civilians of My Lai, and in so doing humiliated the US and called into question the US mission in Viet Nam in a way that all the antiwar protesters could never have done....A young Army First Lieutenant, William Laws Calley, Jr., then stood accused of slaying at least 109 of the Vietnamese civilians in the rural village in South Viet Nam, and at least 25 of his comrades in arms on that day in March 1968 are also being investigated.” “My Lai: An American Tragedy,” *Time*, 5 December 1969, available from <http://www.time.com/time/magazine/article/0,9171,901621-1,00.html>; Internet; accessed 3 March 2007. “Two tragedies took place in 1968 in Viet Nam. One was the massacre by United States soldiers of as many as 500 unarmed civilians—old men, women, children—in My Lai on the morning of March 16. The other was the cover-up of that massacre.” Doug Linder, *An Introduction to the My Lai Courts-Martial*, available from http://www.law.umkc.edu/faculty/projects/ftrials/mylai/MyL_intro.html; Internet; accessed 22 February 2007.

¹² Following the war’s end in neighboring Vietnam, from 1975-1979, the Khmer Rouge (Red Cambodian) leader Pol Pot sought to build a Communist peasant farming society in Cambodia that resulted in the death of over twenty-five percent of the population—or over 2,000,000 people—from a combination of starvation, overwork, and executions. United Human Rights Council, *20th Century Genocides: Cambodia*, 1, available from http://www.unitedhumanrights.org/Genocide/pol_pot.htm; Internet; accessed 19 February 2007. Pol Pot came to power in 1975 when his Khmer Rouge Army seized control of the country after the country’s government fell, racked by political corruption and economic destabilization and lacking any military support from the US government. Once in control, he put into effect a “radical experiment to create an agrarian utopia inspired in part by Mao Zedong’s Cultural Revolution, which he had witnessed first-hand during a visit to Communist China.” *Ibid.*, 2. Calling his experiment the “Super Great Leap Forward,” (after Mao’s “Great Leap Forward”), Pol Pot sought to purify Cambodian society, torturing and purging the “class enemies,” and

extinguishing any ties to capitalism, Western culture, city life, and foreigners. He banned education, health care, and religion, as well as currency, newspapers, radios, and bicycles...and effectively sealed the country from any outside influences. Ibid., 2-3. He instituted a slave labor program, in which millions of Cambodians were forced to work in his “killing fields,” where most died from malnutrition, disease, and/or overwork. Ibid., 3-4. Finally, various ethnic groups—primarily Muslims, Chinese and Vietnamese—were targeted and attacked, resulting in the death of over 200,000 Chinese alone. Ibid., 4.

¹³ Once the West recognized an independent Bosnia in 1992—a primarily Muslim country which contained a Serb minority of almost one-third of the population—the Serbian leader, Slobodan Milosevic, responded by attacking the capitol city of Sarajevo (site of the 1984 Olympics) with artillery and snipers, killing almost 3500 children. As the Serbs gained territory in Bosnia, they began to methodically persecute and dispose of the Muslim inhabitants, either through mass murder, forced relocations, rape, and/or internment in WWII-style concentration camps. United Human Rights Council, *20th Century Genocide: Genocide in Bosnia*, 1-4, available from http://www.unitedhumanrights.org/Genocide/bosnia_genocide.htm; Internet; accessed 19 February 2007. “[F]rom 1991 to 1995, the seething cauldron of what the world once knew as Yugoslavia erupted into a conflict of annihilation pitting former friends, neighbors, and even family members against each other along ethnic lines—Bosnian Serbs, Bosnian Muslims (Bosniacs), and Bosnian Croats....Nearly four years of unchecked violence shocked the international communities’ conscience and the results were staggering:

- Over 200,000 dead men, women, and children;
- Approximately 2,000,000 people displaced from their homes;
- Over 1,000,000 refugees spread across 25 countries;
- Almost 500,000 homes damaged or destroyed;
- Allegations by all sides to the conflict of genocide, crimes against humanity, and other war crimes.”

Center for Law and Military Operations, The Judge Advocate General’s School, U.S. Army, *Law and Military Operations in the Balkans, 1995-1998* (Charlottesville, VA: 13 November 1998), 15-16 (citing International Crisis Group Bosnia: *Refugees and Internally Displaced Persons in Bosnia-Herzegovina* (30 April 1997)).

In Kosovo, “Today’s conflict...is a child of centuries of conflict. Kosovo is a chronicle of refugees fleeing and returning to the area over generations. There have been dozens of wars over hundreds of years. Each generation remembers the wrongs done to the last and passes the bitterness on to the next.” Chicago-Kent College of Law, “A Historical View of the Conflict in Kosovo,” *War Crimes Evidence Library*, available from <http://pbosnia.kentlaw.edu/projects/warcrimes/history.html>; Internet; accessed 24 March 2007. As a direct result of cultural and religious differences, Kosovo...has been the stage for scenes of distrust, hatred, and violence all through its existence. It is quite difficult to accurately portray the magnitude of the hatred and violence that has engulfed the entire region throughout the previous centuries. Center for Law and Military Operations, The Judge Advocate General’s School, U.S. Army, *Law and Military Operations in Kosovo, 1999-2001* (Charlottesville, VA: 15 December 2001), 8, 10. More recently, in 1998, a full-fledged civil war ensued in Kosovo, pitting the Serbian military and police forces against the Albanian Kosovo Liberation Army (KLA), in which thousands died and hundreds of thousands sought refuge elsewhere. Ibid., 34. Once massacres of civilians on both sides occurred, the UNSC stepped in, adopting UNSCR 1199, which highlighted the “impending human catastrophe,” calling for an immediate cease-fire, an international presence, and immediate withdrawal of Serbian troops from Kosovo. Ibid., 34-35. Additional civilian

massacres would occur before the international community stepped in with military force—in the form of a NATO air campaign against the Serbs—in March 1999. Overall, almost one million Albanians became refugees due to the Serbian atrocities, or threats of them. Ibid., 37. Among the worst incidents to occur in this conflict were the “Serbs using the Albanians as human shields, raping women, burning and looting homes, devastating crops and livestock, and destroying ethnic Albanians’ citizenship papers, in an effort to suppress their identity, origin, and property ownership.” Ibid., 39, n.152.

¹⁴ On 6 April 1994, a small plane carrying Rwandan President Juvenal Habyalimana (a Hutu) and Burundi President Cyprien Ntaryamira home from a conference in Tanzania, where they had been meeting with Tutsi rebels to discuss peace initiatives, was shot down close to Rwanda’s airport in Kilgali by ground-fired missiles, killing both men. “Immediately following their deaths, Rwanda plunged into political violence as Hutu extremists began targeting prominent opposition figures on their death lists, including moderate Hutu politicians and Tutsi leaders.” United Human Rights Council, *20th Century Genocides: Genocide in Rwanda*, 1-3, available from http://www.unitedhumanrights.org/Genocide/genocide_in_rwanda.htm; Internet; accessed 19 February 2007. What followed was a 100-day period of absolute genocide in which close to 800,000 Tutsis were killed in Rwanda by Hutu militia—using machetes, clubs, guns, and grenades, and typically hacking their victims to death—at a rate of almost 10,000 individuals killed each day. Ibid. Indiscriminate killing occurred, as the Hutu militia “engaged in genocidal mania.” The militia compelled innocent Hutus to kill Tutsi neighbors, and Tutsis to kill their own family members. Survivors in hospitals were attacked, refugees in churches were slaughtered in mass, and bodies floating down the Kigara River became a common site. Ibid.

¹⁵ Sierra Leone has endured over a decade of civil war, in which the brutality was of unimaginable proportions. Over 1,000,000 civilians have been displaced, and close to 75,000 innocent individuals were killed in the conflict—although not by accident, but as a result of massacres and summary executions. Families were slaughtered in broad daylight in the middle of the street, women and children had limbs hacked off with machetes, young women and girls were dragged off, raped or otherwise sexually abused, and then enslaved, and children were abducted for enlistment as soldiers. Human Rights Watch, *Shocking War Crimes in Sierra Leone: New Testimonies on Mutilation, Rape of Civilians* 1-3, available from <http://hrw.org/english/docs/1999/06/24/sierra926.htm>; Internet; accessed 4 March 2007; Marguerite Feitlowitz, Crimes of War Project, *UN War Crimes Court Approved for Sierra Leone* (8 January 2002), 1-5, available from <http://www.crimesofwar.org/onnews/news-sierra.html>; Internet; accessed 4 March 2007. “If there is a hallmark of this war, it is the forced amputation of human limbs, particularly the hands, arms, and legs of women and children.” Feitlowitz, 1.

¹⁶ The US government claims that the Sudanese government, working closely with a Khartoum-backed Arab militia (Janjaweed), committed genocide and/or crimes against humanity in the Darfur region of Sudan, displacing more than 1,800,000 African villagers and slaughtering tens of thousands of additional civilians. Colum Lynch, “U.S. Urges War Crimes Tribunal for Darfur Atrocities,” *Washington Post*, 28 January 2005, A23, available from <http://www.washingtonpost.com/ac2/wp-dyn/A43162-2005Jan27.htm>; Internet; accessed 4 March 2007. “The conflict has historical roots, but escalated in February 2003, when two rebel groups, the Sudan Liberation Army/Movement (SLA/M), and the Justice and Equality Movement (JEM)...demanded an end to chronic economic marginalization and sought power-sharing within the Arab-ruled Sudanese state. The government responded to this ... by targeting the civilian populations from which the rebels were drawn. It brazenly engaged in ethnic manipulation by organizing a military and political partnership with some Arab nomads

comprising the Janjaweed; armed, trained, and organized them; and provided effective impunity for all crimes committed.” Human Rights Watch, *Sudan: Darfur Destroyed*, 1-2, available from <http://hrw.org/reports/2004/sudan0504/2.htm>; Internet; accessed 22 February 2007. The combined Army and Janjaweed forces have driven civilians into camps outside of towns, where the Janjaweed have raped, pillaged, and murdered anyone of their choosing—to include emergency relief personnel and supplies. Ibid. To more accurately portray who is involved in these massacres, it is instructive to note that the literal translation of the term “Janjaweed” is “devil on a horse.”

¹⁷ The Young Turks; Adolf Hitler; Pol Pot; Idi Amin; the Hutus and Tutsis; Slobodan Milosevic; and the Janjaweed Militia. One could easily see *Time* magazine naming the twentieth century as the “Generation of the Madman” or the “Era of Novel Ways to Torture and Kill Your Fellow Man.”

Once a heavyweight boxing champion as well as a soldier in the British colonial army, Idi Amin, the former Ugandan military ruler who rose to power in a coup on 25 January 1971, was blamed for the death or disappearance of anywhere from 300,000 to 500,000 people during his brutal regime. The dictator, who overthrew his successor, President Milton Obote, while Obote was out of the country, is alleged to have personally ordered the deaths of specific rival tribal groups in Uganda. Some have alleged that he “kept severed heads in his refrigerator, fed corpses to crocodiles, had one of his many wives dismembered...and engaged in cannibalism.” *Former Ugandan Dictator Idi Amin Dies*, CNN.com, 16 August 2003, available from <http://cnn.worldnews.com>; Internet; accessed 22 February 2007.

Slobodan Milosevic, a product of the Yugoslav Communist system, was the former manager of a state-owned gas company when he began his meteoric rise to power after Marshal Tito’s death in 1980. Originally a protégé of Ivan Stambolic, who became Prime Minister after Tito, Milosevic eventually replaced Stambolic and became the President of Yugoslavia. It was in this position, and as the leader of the Serbian Communist Party, that Milosevic was alleged to have committed genocide in Bosnia and Herzegovina, and to have been at least partly responsible for the murder of thousands of civilians, and the ethnic cleansing/expulsion of over 750,000 Albanians from Kosovo and 250,000 non-Serbs from their homes and towns during the Serbs’ war with Croatia. Center for Law and Military Operations, The Judge Advocate General’s School, U.S. Army, *Law and Military Operations in Kosovo, 1999-2001* (Charlottesville, VA: 15 December 2001), 28, 40 (citing G. Richard Jansen, *Albanians and Serbs in Kosovo, An Abbreviated History* 6 (June 1999), available from <http://lamar.colostate.edu/~grjan/kosovohistory.html>; Internet; accessed 25 October 2001); Press Release, The Hague, *President Milosevic and Four Other Senior FRY Officials Indicted for Murder, Persecution, and Deportation in Kosovo* (27 May 1999), available from <http://www.un.org/icty/pressreal/p403-e.htm>; Internet; accessed 4 March 2007; BBC News, Europe, *The Charges Against Milosevic*, 1-2, available from http://newsvote.bbc.co.uk/hi/english/world/europe/newsid_1402000/1402790.stm; Internet; accessed 4 March 2007.

¹⁸ Human Rights Watch, *The International Criminal Court*, available from <http://hrw.org/campaigns/icc>; Internet; accessed 13 November 2006. The diplomatic conference is commonly referred to as the “Rome Conference.”

¹⁹ Rome Statute of the International Criminal Court, 17 July 1998, U.N. Doc A/CONF.183/9 (2002), available from <http://www.un.org/law/icc/statute/romeofra.htm>; Internet; accessed 5

March 2007 [hereinafter Rome Statute]. Adopted on 17 July 1998, the statute in essence defines the ICC's scope of jurisdiction, operations, and duties, among other matters.

²⁰ "July 1, 2002, marked the birth of the International Criminal Court...meaning that crimes of the appropriate caliber committed after that date could fall under the jurisdiction of the ICC....These include genocide, crimes against humanity, war crimes, and potentially the crime of aggression, if the Assembly of States Parties is able to reach an agreement defining it." Jennifer K. Elsea, "U.S. Policy Regarding the International Criminal Court," Congressional Research Service Report for Congress, 1 (29 August 2006) [hereinafter CRS Report].

²¹ Over 100 countries worldwide have become part of the ICC by ratifying the treaty, or statute, which established the Court, to include the United Kingdom, Canada, Australia, and France, the remainder of the European Union, and all of NATO save for Turkey. "More than 1,000 associations have joined the Coalition for the International Criminal Court, including the [International Committee of the] Red Cross, American Bar Association, Amnesty International, Human Rights Watch, Lawyers Committee for Human Rights, and the International Commission of Jurists," among others. Kathryn Schiele, "US Ratification of the International Criminal Court," *Journal of International Relations* (Spring 2004), 63, n.20 (citing Robert C. Johansen, "US Opposition to the International Criminal Court: Unfounded Fears," *Joan B. Kroc Institute for International Peace Studies*, No. 7 (June, 2001)).

²² "Countries have long sought to establish suitable mechanisms for punishing individuals responsible for violent atrocities during conflict, and in the modern era, gross violations of international humanitarian law. Attempts to limit the behavior of military forces in war can be traced back hundreds of years." Victoria K. Holt and Elisabeth W. Dallas, *On Trial: The US Military and the International Criminal Court* (Washington, DC: The Henry L. Stimson Center, March, 2006, Report No. 55), 21 [hereinafter Holt & Dallas].

²³ Recent polling supports two arguments: 1) that most Americans know very little about the specifics of the ICC and the US relationship with the Court; and 2) of those who do, the majority are in favor of US ratification of the Statute. Over 60% of Americans polled indicated that they have not heard anything about the Court; of the 39% that had, only 4% responded that they "know a lot." Notably, 71% of Americans polled agree that "given the events of September 11th, it is more important for the US to work in concert with other nations to establish an international criminal court." Roper ASW/Human Rights First, *Americans' Attitudes Toward an International Criminal Court, US Public Opinion and the ICC* (March 2002), 11-12, available from http://www.globalsolutions.org/programs/law_justice/icc/resources/FINAL_ICC_Comm_Guide.pdf; Internet; accessed 25 March 2007. A significantly large majority (76%) believe in the concept of an international body such as the Court to adjudicate compliance with international law, and an almost equally large majority (69%) believe that the US should not claim a special exception so that it is not subject to that international body. Center on International Cooperation, New York University, *Americans on International Courts and Their Jurisdiction over the US*, (11 May 2006) 3, available from <http://www.amicc.org/docs/PIPA%20Poll%20May%202006.pdf>; Internet; accessed 25 March 2007 (part of WorldPublicOpinion.org). Typical findings in these polls were that Americans perceived the potential benefits of the ICC as "prevention of atrocities, quicker justice for victims of terrorism, decreasing the likelihood of war, and lessening the global police burden on the US." Ibid. A separate poll found a majority of Americans (60%) in favor of referring cases such as Darfur to the ICC rather than a temporary tribunal, such as the US has proposed. Chicago Council on Foreign Relations and the Program on International Policy Attitudes (PIPA) at the University of Maryland, *Americans*

on the Darfur Crisis and ICC, (February 2005), 1-2, available from <http://www.amicc.org/docs/CCFR%20Darfur%20Referral%203-2005.pdf>; Internet; accessed 25 March 2007.

As a direct result of this lack of knowledge and information about the Court, Holt & Dallas found that the US military was burdened with high anxiety about the Court and what effect it would have on the military, individually and as a whole. In response, they recommended that the US work to reduce this anxiety level by developing educational tools that would provide the military with information concerning the Court that, in turn, would clarify how the Court works and how it may affect military personnel. Holt & Dallas, 74-75. As such, my intent is to add to that educational and informational process in this Strategy Research Project.

²⁴ Although I would prefer to take credit for developing these terms in the context of the ICC, they were actually conceived by Professor Michael P. Scharf and set forth in an article that he penned for a written debate over the permanent international criminal court. Michael P. Scharf, "The Case for Supporting the International Criminal Court," in *National Security Law*, eds. John Norton Moore and Robert F. Turner (Durham, N.C.: Carolina Academic Press, 2005), 441.

²⁵ "For nearly half a century—almost as long as the UN has been in existence—the General Assembly has recognized a need to establish a court to prosecute and punish persons responsible for crimes like genocide. Many thought...that the horrors of the Second World War—the camps, the cruelty, the exterminations, the Holocaust—could not happen again. And yet they have. In Cambodia, in Bosnia and Herzegovina, in Rwanda. Our time—this decade even—has shown us that man's capacity for evil knows no limits. Genocide...is now a word of our time, too, a heinous reality that calls for a historic response. UN Secretary-General Kofi Annan, *Protecting Human Rights of One Individual Promotes Peace of All Humanity*, lecture, UN Educational, Scientific, and Cultural (UNESCO) Headquarters, Paris, France, 8 December 1998 (UN Press Release SG/SM/6825 HR/4391, available from <http://www.un.org/News/Press/docs/1998/19981208.sgs6825.html>; Internet; accessed 6 March 2007.

²⁶ During the fifty-second session of the UN General Assembly (UNGA), from 15 June through 17 July 1998, in Rome, Italy, the UN Conference of Plenipotentiaries on the Establishment of an International Criminal Court—commonly referred to as the "Rome Conference"—met to "finalize and adopt a convention on the establishment of an international criminal court." *Rome Statute of the International Criminal Court, An Overview*, available from <http://www.un.org/law/icc/general/overview.htm>; Internet; accessed 31 December 2006 [hereinafter *ICC Overview*].

²⁷ M. Cherif Bassiouni, "Establishing an International Criminal Court: Historical Survey," in *Nuremburg and the Rule of Law: A Fifty-Year Verdict*, *Military Law Review*, Vol. 149 (Winter 1995), 49, nn. 1, 2. "...the world's major powers...progressively have recognized the aspirations of world public opinion for the establishment of an impartial and fair system of international criminal justice." Ibid., 53.

²⁸ "The 'road to Rome' was a long and often contentious one. While efforts to create a global criminal court can be traced back to the early 19th century, the story began in earnest in 1872 with Gustav Moynier—one of the founders of the International Committee of the Red Cross—who proposed a permanent court in response to the crimes of the Franco-Prussian War. The next serious call for an internationalized system of justice came from the drafters of the

1919 Treaty of Versailles, who envisaged an ad hoc international court to try the Kaiser and German war criminals of World War I. Following World War II, the Allies set up the Nuremberg and Tokyo tribunals to try the Axis war criminals.” Coalition for the International Criminal Court, *About the Court: History of the ICC*, available from <http://www.iccnw.org>; Internet; accessed 31 December 2006 [hereinafter *About the Court*].

²⁹ Treaty of Versailles, 28 June 1919, art. 227, 2 Bevens 43, 136. Articles 227-229 called for the trial of Kaiser Wilhelm II for “a supreme offense against international morality and the sanctity of treaties,” and for *ad hoc* tribunals to try “persons accused of having committed acts in violation of the laws and custom of war.” Bassiouni, 53. However, the Allies acquiesced to German resistance to extradition and allowed Germany to conduct national prosecutions instead. These took place in Leipzig, where the accused individuals were treated as heroes vice criminals, resulting in many acquittals despite strong evidence to the contrary. *Law of War Handbook*, 202. Additionally, the Kellogg-Briand Pact of 1928, banned, for the first time, aggressive war. It was this treaty that both captured the essence of the international move to attempt to prevent war and limit human suffering, and served to create an international legal basis for the post-WW II prosecution of those who had waged aggressive war. *Ibid.* Treaty Providing for the Renunciation of War as an Instrument of National Policy, done at Paris, 27 August 1928, 46 Stat. 2343, T.S. No. 796, 2 Bevens 732.

³⁰ Following WWII, the Allies established the International Military Tribunal (IMT) sitting in Nuremberg (1945), and the IMT for the Far East (IMTFE) sitting in Tokyo (1946). The Allies began an aggressive program to prosecute and punish, as applicable, all war criminals in both theaters. The combined trial of 24 German leaders occurred in Nuremberg, and the combined trial of 28 Japanese leaders took place in Tokyo. There were twelve other trials under international authority in Nuremberg, and thousands of other trials before national courts and military commissions worldwide. *Law of War Handbook*, 202. “...the post-WWII experience revealed how effective international justice could be when there is political will to support it and the necessary resources to render it effective.... Among all historical precedents, the IMT [Nuremberg] whatever its shortcomings may have been, stands as the epitome of international justice and fairness.” Bassiouni, 55. See London Agreement & London Charter; International Military Tribunal for the Far East, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, 19 January 1946, T.I.A.S. 1589, 4 Bevens 20; Amended Charter dated 26 April 1946, 4 Bevens 27. Importantly, both the IMT and IMTFE only had jurisdiction over individuals, vice states.

³¹ In Resolution 260, the UNGA indicated that, “Recognizing that at all periods of history genocide has inflicted great losses on humanity; and being convinced that, in order to liberate mankind from such an odious scourge, international cooperation is required...” it would adopt the Convention that characterized Genocide as a “crime under international law,” and that any person charged with such a crime would be “tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction.” Genocide Convention, 277; *ICC Overview*, 1. The 1972 Apartheid Convention also makes reference to an international criminal body that would have jurisdiction to prosecute apartheid crimes. Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068 (XXVIII), 28th Session, Supp. No. 30, at 75, U.N. Doc. A/9030 (30 November 1973), entered into force 18 July 1976.

³² *ICC Overview*, 1(citing to UN Security Council Resolution 260, dated 9 December 1948); *About the Court*, 1.

³³ “Following the Commission’s conclusion that the establishment of an international court to try persons charged with genocide or other crimes of similar gravity was both *desirable* and *possible*, the General Assembly established a committee to prepare proposals relating to the establishment of such a court. The committee prepared a draft statute in 1951 and a revised statute in 1953.” *ICC Overview*, 1 (emphasis added).

³⁴ Ultimately, the UNGA delayed deliberation on this draft statute in an effort to first develop agreement on a definition of the “crime of aggression” as well as an international Code of Crimes. *About the Court*, 1. “Although there were trials for aggression at Nuremberg, an acceptable definition for its elements has long eluded the international community, impeding earlier attempts to establish an international court.” Jennifer K. Elsea, *International Criminal Court: Overview and Selected Legal Issues*, Congressional Research Service Report for Congress (5 June 2002), 20 (order code RL31437). The UNGA had also asked the ILC to develop a “Draft Code of Offenses Against the Peace and Security of Mankind,” (later renamed the Draft Code of Crimes) which it completed in 1954. The UNGA had asked a separate committee (actually, four) to develop a definition of the term “aggression,” which took over twenty years to complete. The UNGA finally adopted the definition provided by the committees in 1974, yet it has only been invoked once by the UNSC, in South Africa in 1977. *Ibid.*, 20. This definition was revised yet again in 1991 and 1995, yet the ICC has still not agreed on, nor adopted, a definition. Bassiouni, 58-60.

³⁵ Cambodia saw 2 million perish, and “[t]housands of civilians, including horrifying numbers of unarmed women and children, lost their lives in armed conflicts in Mozambique, Liberia, El Salvador, and other countries.” *Hunt for Justice*, available from <http://www.huntforjustice.com/4-icc-en.php>; Internet; accessed 6 March 2007. In Mozambique, where the people had endured a devastating civil war for almost sixteen years, over 1,000,000 died, 4,500,000 became refugees/displaced persons, and the country’s infrastructure was destroyed. James L. Woods, *Mozambique, The CIVPOL Operation*, 1-2, available from <http://www.ndu.edu/inss/books/201998/policing.htm>; Internet; accessed 8 March 2007. “From 1989 to 2003, Liberia had been engulfed in two armed conflicts typified by egregious human rights violations.” Human Rights Watch, *World Report 2007; Liberia: Events of 2006*, available from <http://hrw.org/englishw2k7/docs/2007/01/11/liberi14716.htm>; Internet; accessed 7 March 2007. In El Salvador, a UN Commission on the Truth for El Salvador, which published a report in March 1993 concerning the civil war between an armed insurgency and the military-backed government, determined that Salvadoran armed forces and death squads bore principal responsibility for the murder, disappearance, and torture of countless Salvadoran civilians. Human Rights Watch, *Accountability and Human Rights: Report of the UN Commission on the Truth for El Salvador* (March 1993), available from http://hrw.org/doc/?t=americas_pub&c=elsalv; Internet; accessed 21 March 2007.

³⁶ In light of the ethnic cleansing in Bosnia and Kosovo, and the genocide in Rwanda, the international community placed substantial pressure on the UNSC to take decisive action. Allowing national authorities to conduct investigations and prosecutions had verified that it was a completely unrealistic alternative. Holt & Dallas, 23-24. The “former Yugoslavian and Rwandan conflicts led to one of the most profound developments in international humanitarian law since the end of WWI—the creation of international judicial mechanisms designed to bring to justice those who commit crimes against their own nationals.” *Ibid.*, 24. On 22 February 1993, the UNSC created the first global war crimes tribunal since the IMT and IMTFE in WWII, establishing the ICTY via UNSCR 808. *Law of War Handbook*, 203. On 8 November 1994, the UNSC created the ICTR via UNCSR 955, adopting all the rules of procedure and evidence from

the ICTY, with applicable changes. Ibid. Additionally, and of note, on 14 August 2000, the UNSC established the Special Court for Sierra Leone, via UNSCR 1315, which approved a separate agreement between Sierra Leone and the UN Secretary-General to create a hybrid international-domestic court. Ibid.; Office of Press and Public Affairs, Special Court for Sierra Leone, *Special Court for Sierra Leone: Basic Facts*, 1-2, available from www.sc-sl.org; Internet; accessed 25 March 2007; BBC News, Africa, *Sierra Leone's War Crimes Tribunal*, 1-2 (10 March 2004), available from <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/3547345.stm>; Internet; accessed 4 March 2007.

³⁷ In 1989, at the request of Trinidad and Tobago, the UNGA asked the ILC to continue drafting the ICC statute. Trinidad & Tobago asked the UNGA to resurrect the draft statute for the ICC for the purpose of prosecuting individuals involved in drug trafficking. Bassiouni, 61; *ICC Overview*, 1-2.

³⁸ The UNGA established both an Ad Hoc and Preparatory Committee on the Establishment of an International Criminal Court—the former to study major substantive issues that surfaced out of the final draft statute, and the latter to prepare a “widely acceptable draft text for submission to a diplomatic conference.” *ICC Overview*, 1-2. The committees completed all of their work by 1998. Following the Rome Conference, the Preparatory Committee was tasked with negotiating related, or complementary documents, such as the Rules of Evidence and Procedure, Elements of Crimes, UN-ICC Relationship Agreement, and other documents of a similar nature. *About the Court*, 2.

³⁹ On the last day of the Conference, while 120 member states voted in favor of the treaty, only seven nations voted against adopting it—the US, China, Israel, Iraq, Libya, Qatar, and Yemen. Twenty-one other nations abstained from voting. Elsea, 2.

⁴⁰ The statute set a deadline of 31 December 2000 for signing the treaty. On the last day, the US was joined by Israel and Iran. 139 states actually signed the treaty by the deadline. Coalition for the International Criminal Court, *A Timeline of the Establishment and Work of the International Criminal Court*, available from <http://www.iccnw.org>; Internet; accessed 27 January 2007 [hereinafter *Timeline*].

⁴¹ The trigger for the Statute to enter into force was the 60th ratification of the Statute, which occurred on 11 April 2002. The Statute specifically provides in Article 126 that it will “enter into force on the first day of the month after the 60th day following the date on which the 60th nation submits its instrument of ratification to the UN.” Rome Statute, art. 126. The first state to ratify the Rome Statute was Senegal, which notified the Secretary-General on 2 February 1999 of its ratification. On 11 April, ten states simultaneously deposited their treaty instruments designating ratification of the treaty in a special ceremony at UN headquarters in New York: Bosnia & Herzegovina, Bulgaria, Cambodia, Democratic Republic of the Congo, Ireland, Jordan, Mongolia, Niger, Romania and Slovakia. Sixty-six countries, representing six more than was necessary to establish the Court, ratified the treaty by 11 April 2002. *Timeline*, 2. Notably, the sixtieth ratification came many years earlier than anyone had anticipated or predicted.

⁴² As of that date, the treaty became binding on all countries which had ratified or acceded to the Rome Statute and for which it had entered into force by that date. Ibid. As of 30 March 2007, 139 countries have signed the treaty, and 104 have ratified it. The American Non-Governmental Organization Coalition for the International Criminal Court (AMICC), *Ratifications*

and *Declarations*, available from http://www.amicc.org/icc_ratifications.html; Internet; accessed 30 March 2007 [hereinafter *Ratifications*].

⁴³ “...for vigilance to be eternal, there must be persons who are vigilant.” William A. Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press, 2000), 624.

⁴⁴ Rome Statute, articles 1, 4-5; Elsea, 1. The first standing court of its kind, the ICC is specifically designed to be an international treaty-based institution, which allows all member states an opportunity to take part in its development and have an influence on its operations.

⁴⁵ Although article 2 of the Rome Statute indicates that the Assembly of States Parties will bring the Court into a “relationship with the United Nations through an agreement to be approved by the Assembly...and thereafter concluded by the President of the Court...” Rome Statute, art. 2. This was accomplished through a Memorandum of Agreement between the UN and the ICC signed and entered into force on 4 October 2004. The memorandum identifies the role and mandate of each institution, and is designed to “strengthen the cooperation of the two organizations on matters of mutual interest, relating to the exchange of information [and representatives], judicial assistance, and cooperation on infrastructure and technical matters.” “ICC-UN Agreement Signed,” *ICC Newsletter*, #2 (October 2004), available from http://www.icc-cpi.int/library/about/newsletter/files/ICC-NL2-200410_En.pdf; Internet; accessed 7 March 2007. Moreover, the ICC is not connected to the International Court of Justice (ICJ or World Court), which is designed to address grievances or disputes between member states. Reuters, Key Facts About the International Criminal Court (29 January 2007), available from <http://www.alertnet.org/thenews/newsdesk/L2914302.htm>; Internet; accessed 18 February 2007 [hereinafter Reuters *Key Facts*].

⁴⁶ The Assembly, composed of State Parties to the Statute (those states that have ratified the Statute, one vote per state), will among many other duties elect and remove both judges and prosecutors, address amendments to the Statute, approve the budget (while financing the budget through mandatory dues for each member state), and oversee all facets of the Court’s work. Rome Statute, arts. 36, 46, 49, 112, 121; The American Non-Governmental Organizations Coalition for the International Criminal Court (AMICC), *Basic Facts About the International Criminal Court*, (5 September 2006), 1-2, available from <http://www.amicc.org/icc.html>; Internet; accessed 27 January 2007 [hereinafter AMICC *Basic Facts*].

⁴⁷ Rome Statute, arts. 3, 34. Key functions of the Registry include responsibility for the Court’s financial management and for the field offices where investigations are being conducted, such as in Kinshasa, Democratic Republic of Congo, and Kampala, Uganda. *Ibid.*, art 43. Holt & Dallas, 27 (citing UNGA, *Report of the International Criminal Court (A/60/177)* (1 August 2005), 8). The first Prosecutor—elected by the Assembly on 21 April 2003 and sworn in on 16 June 2003—is Luis Moreno Ocampo of Argentina. His Deputy Prosecutor for Investigations is from Belgium, and his Deputy Prosecutor for Prosecutions is from The Gambia. AMICC *Basic Facts*, 1. Philippe Kirsch of Canada was elected President, and his First Vice-President hails from Ghana, while the Second Vice-President is from Bolivia. *Ibid.* Each of the 18 judges elected in February 2003 were elected by a two-thirds vote of the Assembly to serve for staggered nine-year terms. *Ibid.* Rome Statute, art. 36. The Statute requires that judges be selected to be representative of the international community based on geography, legal systems and specialties, and gender. Judges may be removed by a 2/3 majority vote of the Assembly following a 2/3 majority recommendation from fellow judges that the judge in question be removed for serious misconduct or inability to perform functions of position. *Ibid.*, arts. 36, 46.

⁴⁸ Articles 13, 14 and 15 set forth in detail the methods by which matters may be referred to the Court for consideration. The Statute also allows the UNSC to defer an investigation for a renewable period of 12 months through a UNSC adopted resolution IAW Chapter VII of the UN Charter. Rome Statute, art. 16.

⁴⁹ Rome Statute, art. 11. “The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole.” Ibid.

⁵⁰ “That is, any nation may lawfully try any individual accused of such crimes in its domestic court system without regard to the nationality of the alleged perpetrator or the territory where the crime is alleged to have taken place.” Elsea, 21. Rome Statute, preamble (“Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”). For an in-depth analysis of the concept of universal jurisdiction, see M. Cherif Bassiouni, “Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice,” 42 *Virginia Journal of International Law*, 81 (2001) and Lee A. Casey, “The Case Against the International Criminal Court,” 25 *Fordham International Law Journal*, 840 (2002).

⁵¹ As such, the Court has jurisdiction over accused individuals from nations that are not parties to the Statute if the crime alleged occurred in the territory of a state that is a party (or consents if a non-party). This is an important point for US interests. In cases where the Prosecutor has initiated the investigation on his own, under Article 15, the Prosecutor must obtain judicial review of his decision by two judges of a three-judge panel in the Pre-Trial Chamber before the Court issues an arrest warrant and continues the investigation. Rome Statute, art. 15. In cases referred by a state party, or initiated by the Prosecutor (in which judicial approval has been obtained), where the Prosecutor determines that an investigation is warranted, he must then notify all state parties and any other state that could reasonably assert jurisdiction—confidentially, to protect evidence and the identity of those involved. Ibid., art. 18. States with conventional jurisdiction may notify the Prosecutor within 30 days of intent to investigate and the Prosecutor must defer to that state, or seek redress from the Pre-Trial Chamber. Ibid.

⁵² Ibid., art. 17, entitled “Issues of Admissibility.” As such, cases are inadmissible if the state with jurisdiction is either investigating or prosecuting the case, has investigated the case and has decided not to prosecute the matter, or has already prosecuted the case (for the subject matter that forms the basis of the complaint), and double jeopardy under article 20 has attached. Ibid. To further determine admissibility, the Prosecutor will also consider whether the gravity of the crimes alleged warrants action by the Court, taking into account the number and nature of the crimes, the victim’s interests, and the overall interests of justice. Ibid., art. 53.

⁵³ Holt & Dallas, 28; Elsea, 22. This is known as the “Principle of Complementarity.” Again, under the Statute, the Prosecutor has an obligation to “defer to the state’s request to investigate and prosecute at that national level unless the Pre-Trial Chamber determines that the state is unable or unwilling to exercise jurisdiction effectively and decides to authorize the Prosecutor to investigate the claim.” Holt & Dallas, 28-29; Rome Statute, art. 18. How does the Pre-Trial Chamber determine if a state is *genuinely* unable or unwilling to investigate or prosecute? Article 17 sets forth a three-part test, any one of which will result in a finding of unwillingness:

- The state is attempting to shield the person concerned from criminal responsibility;

- There has been an unjustifiable delay, inconsistent with an intent to bring the person concerned to justice;
- The proceedings are not being conducted independently or impartially.

Rome Statute, art. 17. Such decisions of the Pre-Trial Chamber may be taken up to the Appeals Chamber by either the state or the Prosecutor. Ibid., arts. 18, 82.

⁵⁴ The draft Statute was largely modeled after the statutes from the successful and popular *ad hoc* courts. The drafters were able to consider not only the IMT and IMTFE out of WWII, but the three more modern tribunals arising out of Yugoslavia (ICTY), Rwanda (ICTR), and the Special Court for Sierra Leone. Each built on the lessons of the previous era and tribunals. The ICTY expanded the definition of war crimes and crimes against humanity to cover rape, persecution, and other inhumane acts (authorizing prosecution for persecution on political grounds), the ICTR focused on genocide and mass killings (again authorizing prosecution for persecution on political grounds), and the Special Court for Sierra Leone concentrated on offenses related to the abuse of girls and the conscription of children under 15 for military service. Holt & Dallas, 24; Law of War Handbook, 209-12.

⁵⁵ Rome Statute, art. 6. The definition of genocide adopted by the Court is consistent with the definition contained in the Genocide Convention, *supra* note 2. There is no need to tie the crime to an armed conflict to be genocide. It is the *mens rea*, or intent, element of the crime that distinguishes genocide from crimes against humanity. Kriangsak Kittichaisaree, *International Criminal Law* (2001), 69. Note, too, that “every act of Genocide constitutes a Crime Against Humanity, although not every Crime Against Humanity amounts to Genocide...and ethnic cleansing is a Crime Against Humanity, but it is not *per se* Genocide.” Dinstein, 1-2.

⁵⁶ Rome Statute, art. 7. See Dinstein, 1-8; Elsea, 14-16.

⁵⁷ Rome Statute, art. 8. The Court’s jurisdiction over war crimes is limited to those “in particular when committed as part of a plan or policy or as part of a large scale commission of such crimes.” Ibid. The drafters intended this language to serve as a jurisdictional threshold to prevent the ICC from taking up relatively insignificant cases. However, a concern exists that if the elements within the Statute are “interpreted within the established framework of the international law of armed conflict,” no proof of the existence of any “plan or policy” to commit a war crime will be required, thus lowering the threshold significantly. Elsea, 19. As discussed in detail later in this paper, initial cases addressed by the Prosecutor make it quite evident that the Court is, in fact, applying a “gravity threshold,” and rejecting cases that do not meet the threshold. Nevertheless, this significant concern over the interpretation of a critical portion of the Statute clearly demonstrates why the US must stay engaged and cooperate with the Court to ensure that it properly carries out its duties to the world. See *infra* notes 88-89.

⁵⁸ The Statute added the caveat that a definition of aggression, as well as the conditions under which the Court would exercise jurisdiction with respect to the crime, consistent with the UN Charter, must first be adopted in accordance with articles 121 and 123 of the Statute. To date, this has not been accomplished, and will likely not be considered until at least 2009. Rome Statute, art. 5. Some, to include the US, fear that the Statute may ultimately divest the UNSC of its prerogative in determining whether an act of aggression has occurred. This ultimately hinges on the interpretation of the “consistent with the UN Charter” language above. If the Rome Statute definition requires a determination by the UNSC that a crime of aggression has occurred, then the UNSC obviously retains its prerogative—if not, then legitimate acts of self-defense could potentially be prosecuted as crimes of aggression. Elsea, 20-21. This is yet

another reason why the US *must* participate, to ensure that a final definition of aggression includes a determination by the UNSC that aggression has, in fact, occurred.

⁵⁹ The Court has actually received over 1730 “communications” since its inception, from 103 different nations, containing allegations regarding potential cases. It has received four “referrals.” Office of the Prosecutor, ICC, *Update on Communications Received by the Office of the Prosecutor of the ICC* (1 February 2006), available from http://www.icc-cpi.int/library/organs/otp/OTP_Update_on_Communications_10_February_2006.pdf; Internet; accessed 24 March 2007. Of the communications received, 80% were determined to be “manifestly outside” the Court’s jurisdiction once an initial review was complete. Ten “situations” have been the subject of more intensive analysis and, of these ten, three have moved on to the investigation stage, two were dismissed, and five are currently undergoing greater analysis. The Prosecutor has issued two response letters—one concerning allegations stemming from the Iraq conflict, and the other out of Venezuela. *Ibid.* The Statute requires the Prosecutor to consider the following when analyzing information provided to the Court to determine if a basis exists to conduct an investigation: “if a reasonable basis exists to believe that a crime within the jurisdiction of the Court has been committed [jurisdiction]; the gravity of the crimes [admissibility]; complementarity with national proceedings [admissibility]; and interests of justice.” *Ibid.*; Rome Statute, art. 53; *Ibid.*, arts. 5-8, 12-13, 17-18.

⁶⁰ The UNSC, in Security Council Resolution 1593, made its first referral to the Court, directing it to investigate the situation in Darfur, Sudan. S.C. Res. 1593, U.N. Doc. S/RES/1593 (2005). The UN had established the International Commission of Inquiry on Darfur (Darfur Commission), which found the circumstances in Darfur to pose a threat to international security, and that what had taken place could potentially qualify as crimes against humanity. United Nations, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* (25 January 2005), available from http://www.un.org/News/dh/sudan/com_inq_darfur.pdf; Internet; accessed 25 March 2007. The claims allege atrocities against women, extrajudicial executions, and torture.

⁶¹ The Prosecutor sent the third, referred by the CAR, back to the CAR government, encouraging it to use its national system to prosecute the case, and vowing to monitor the situation. See Chief Prosecutor, International Criminal Court, The Hague, *Prosecutor Receives Referral Concerning the Central African Republic* (7 January 2005), available from http://www.icc-cpi.int/pressrelease_details&id=87&l=en.html; Internet; accessed 15 March 2007; AMICC, *The Referral to the ICC by the Government of the Central African Republic* (30 August 2005), available from <http://www.amicc.org/docs/Central%20African%20Republic.pdf>; Internet; accessed 15 March 2007.

⁶² The governments of both the Democratic Republic of the Congo (DRC) and Uganda asked the ICC to investigate. In the DRC, close to 4,000,000 individuals have died and almost as many have been forced to flee the conflict. On 10 February 2006, the Court issued an arrest warrant for Thomas Lubanga Dyilo, the alleged founder, President, and Commander-in-Chief of the two rebel groups in the DRC. He was arrested in Kinshasa on 17 March 2006 and transferred to The Hague, where he will now stand trial for enlisting, conscripting, and using children under 15 in active hostilities. On 29 January 2007, Pre-Trial Chamber I confirmed the charges against him and referred his case to the Trial Chamber for trial. ICC, *Prosecutor v. Thomas Lubanga Dyilo*, available from http://www.icc-cpi.int/cases/RDC/c0106/c0106_pr.html; Internet; accessed 25 March 2007. In Uganda, a nine-month investigation revealed that at least 2,200 killings and 3,200 abductions occurred from July 2002 – June 2004—including men,

women, boys and girls from different localities; the destruction of various villages and camps; the burning of families; and, after abducting children, then forcing young boys to kill and young girls to be sex slaves. OTP, ICC, *The Investigation in Northern Uganda* (14 October 2005), available from http://www.icc-cpi.int/library/organs/otp/Uganda_PPpresentation.pdf; Internet; accessed 25 March 2007.

⁶³ On 13 October 2005, the ICC indicted five individuals involved in the crimes in Uganda: Joseph Kony, the LRA Leader, who was charged with crimes against humanity and war crimes, and four of his top Lieutenants. Reuters *Key Facts*, 1.

⁶⁴ The Prosecutor, in conducting a preliminary inquiry on Darfur, a severely troubled region in Sudan, reviewed over 2,500 documents and a sealed list of 51 suspects, provided by the Darfur Commission, as well as 3,000 documents provided by the African Union. Holt & Dallas, 33.

⁶⁵ On 27 February 2007, the Chief Prosecutor, ICC, formally requested summonses to appear, from Pre-Trial Chamber I, for two individuals—Ahmad Muhammad Harun, former Minister of State for the Interior of the Government of Sudan, and Ali Muhammad Ali Abd-Al-Rahman, a Janjaweed leader. The Prosecutor indicated that he had found a reasonable basis to believe, on the evidence collected, that the two men were criminally responsible for “51 counts of alleged crimes against humanity and war crimes—including persecution, torture, murder, and rape committed in Darfur in 2003 and 2004.” Office of the Prosecutor, ICC, *Situation in Darfur, the Sudan: Prosecutor’s Application Under Article 58(7) (Summary)* (27 February 2007), 1, available from http://www.icc-cpi.int/library/cases/ICC-02-05-56_English.pdf; Internet; accessed 25 March 2007.

⁶⁶ Scharf, 441. Scharf quotes David Scheffer, then-US Ambassador-at-Large for War Crimes Issues, speaking before the Senate Foreign Relations Committee on 23 July 1998: “Our experience with the establishment and operation of the International Criminal Tribunals for the former Yugoslavia and Rwanda had convinced us all of the merit of creating a permanent court that could be more quickly available for investigations and prosecutions and more cost-efficient in its operation.” Ibid. The US clearly understood that an entity like the ICC “could help end impunity, bring about justice to some of the world’s worst war criminals and provide a mechanism for encouraging national investigations and prosecutions of such crimes.” Holt & Dallas, 19 (citing a quote taken from Ambassador David Scheffer, “Article 98(2) of the Rome Statute: America’s Original Intent,” *Journal of International Criminal Justice* 3 (2005), 333-353).

⁶⁷ Scharf, 440.

⁶⁸ Holt & Dallas, 24. The UN had established the ICTY, ICTR, and Special Court for Sierra Leone, and there was a push to create *ad hoc* courts for Cambodia and East Timor. Ibid.

⁶⁹ Scharf, 440. Reaching agreement on the statute governing the Court’s operations, electing Prosecutors and judges, locating suitable courtrooms, offices, and prisons, and obtaining sufficient funding to finance the tribunal proved to be quite difficult and ultimately exhausting for the UNSC members to conduct on a repeated basis. Ibid.

⁷⁰ Although voting against the Statute on 17 July 1998, the US did sign the “Final Act of the Conference,” which is essentially a presentation of what transpired during the Rome Conference. By so doing, the US ensured that it would still serve as a voting member of the

Preparatory Committee, which is charged with drafting the rules of procedure and evidence, elements of the crime, UN-ICC Agreement, budget, and so on. Elsea, 6-7, n.29. See also <http://www.un.org/law/icc> for copies of the listed documents.

⁷¹ “Nevertheless, President Clinton signed the treaty on December 31, 2000—the last day it was open for signature without simultaneous ratification, at the same time declaring that the treaty contained ‘significant flaws’ and that he would not submit it to the Senate for its advice and consent ‘until our fundamental concerns are satisfied.’” Elsea, 3. As is evident, the US concerns over the Statute and its opposition to ratification predated the Bush Administration—this is not purely an issue or concern of the current President. However, the Bush Administration appears to have significantly increased the level of opposition to the Court.

⁷² “Although some in the media have described the act as an ‘unsigning’ of the treaty, it may be more accurately described as a notification of intent not to ratify.” Elsea, 1. The 6 May 2002 memo from Under Secretary of State John Bolton to the UN Secretary-General stated:

This is to inform you, in connection with the Rome Statute of the ICC adopted on July 17, 1998, that the US does not intend to become a party to the treaty. Accordingly, the US has no legal obligations arising from its signature on December 31, 2000. The US requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary’s status lists related to this treaty.

See also U.S. Department of State, Office of War Crimes Issues, *The International Criminal Court: A Fact Sheet* (6 May 2002) 1-3, available from http://www.policyalmanac.org/world/archive/state_international_criminal_court.shtml; Internet; accessed 13 November 2006 (providing the US decision, background information, a list of the significant problems with the treaty, and some alternate mechanisms to the ICC) [hereinafter *DOS Fact Sheet*]. Because the US signed the Statute, it was required under international law to refrain from any activity that would contravene the purpose of the Statute. However, once the US indicated its intent to not ratify, the requirement terminated. CRS Report, 4, n.17.

⁷³ Human Rights Watch, *International Justice: Questions and Answers about the International Criminal Court*, 1, available from <http://www.hrw.org/campaigns/icc/qna.htm>; Internet; accessed 21 March 2007 [hereinafter *HRW International Justice*].

⁷⁴ A total of 104 nations have ratified the Statute and 139 are signatories. *Ibid.*; *Ratifications*, 1. One of the issues that may not sit well with some Americans is that the Court has no competence to impose the death penalty as a lawful sentence. When justified by the nature of the crime—and most crimes tried before the Court will clearly be of a serious nature—the Court may impose sentences ranging up to life imprisonment, as well as fines and forfeiture of proceeds, property, or assets derived from commission of the crime. In light of events in Europe, where many former Communist countries have joined the Council of Europe and signed on to the European Human Rights Convention—which requires, as part of becoming a signatory, that the nation abolish the death penalty within its borders—it was extremely unlikely heading into the discussion and debates in Rome that the US, or any other pro-death penalty nation, would succeed in convincing the conference to adopt the death penalty as a permissible punishment. In the end, as with many contested issues regarding the Court, it becomes a balancing test. If the death penalty becomes a “red line” for the US, and the choice becomes a Court with no death penalty, or no Court, the prudent decision is to opt for an operational and

effective Court now, with a determination to work cooperatively to change those aspects of the Court that require such change. As with any international agreement, its formation must be a cooperative effort and certain allowances must be made.

⁷⁵ Congressional Research Service, The Library of Congress, *The International Criminal Court Treaty: Description, Policy Issues, and Congressional Concerns* (6 January 1999), 9.

⁷⁶ The US believes that accountability for such crimes comes from national judicial systems and *ad hoc* international tribunals properly established by the UNSC. *DOS Fact Sheet*, 2-3. However, this shortsighted and parochial perspective fails to account for the lack of properly functioning national courts in some countries, or an unwillingness to prosecute in rogue regimes, or the “Tribunal Fatigue” suffered by the UN and many member countries when attempting to establish numerous *ad hoc* tribunals.

⁷⁷ CRS Report, 4. The US contends that the potential for prosecution could negatively affect foreign policy and military operations, which is an infringement of US sovereignty. *Ibid.* “...as the world’s greatest military and economic power, more than any other country the US is expected to intervene to halt humanitarian catastrophes around the world. This unique position renders US personnel uniquely vulnerable to the potential jurisdiction of an international criminal court.” Scharf, 441.

⁷⁸ Scharf believes that the US played “hard-ball in Rome” and came away with almost all it needed, but weakened the ICC in so doing. Scharf, 442. To prove it, he quotes Ambassador Scheffer’s testimony before the Senate Foreign Relations Committee: “The US delegation certainly reduced exposure to unwarranted prosecutions by the international court through our successful efforts to build into the treaty a range of safeguards that will benefit not only us but also our friends and allies.” *Ibid.* It is interesting to note that all of these concessions proved to be enough for 120 other nations, to include the U.K., Canada, France, Australia, and Russia, but not the US. *Ibid.*

⁷⁹ “The ICC is intended to resolve the problem of impunity for perpetrators of atrocities, but has led to a different concern, namely, that the ICC may be used by some countries to make trumped-up allegations accusing other states’ policymakers, or even implementers of disfavored policies, of engaging in criminal conduct. Probably the most divisive issue at the Rome Conference was the effort to reach a balance between the two extremes—how to bring perpetrators of atrocities to justice while protecting innocent persons from frivolous prosecution....” Elsea, 21-22; Rome Statute, preamble (“Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished....” and “Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes....” and “Recalling that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes....”).

⁸⁰ Ambassador Scheffer, testifying before the Senate Foreign Relations Committee, indicated that “the treaty purports to establish an arrangement whereby US armed forces operating overseas could be conceivably prosecuted by the international court even if the US has not agreed to be bound by the treaty....this is contrary to the most fundamental principles of treaty law.” U.S. Congress, Senate, Committee on Foreign Relations, Subcommittee on International Operations, *Hearing on the Permanent International Criminal Court*, 105th Cong., 2d sess., 23 July 1998, 13. The Ambassador subsequently indicated that this ability represented the “single most fundamental flaw in the Rome Treaty that makes it impossible for

the US to sign the present text.” David Scheffer, *International Criminal Court: The Challenge of Jurisdiction*, Address at the Annual Meeting of the American Society of International Law, 26 March 1999. However, Professor Scharf contends that this argument “rests on shaky foundations,” asserting that “the ICC’s jurisdiction over nationals of non-party states...[is]...well-grounded in international law. The exercise of such jurisdiction can be based both on the universality principle and the territoriality principle.” Michael P. Scharf, “The ICC’s Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position,” *Law and Contemporary Problems*, no. 64 (2001), 71, 116. See also Ruth Wedgewood, “The United States and the Statute of Rome,” 95 *American Journal of International Law* 124 (2001), 126-27.

⁸¹ Moreover, the IMT (Nuremburg) and the ICTY (Yugoslavia) serve as precedent for the “collective delegation of universal jurisdiction to an international criminal court without the consent of the State of nationality of the accused.” Scharf, 443.

⁸² Ibid. Scharf believes that the argument presented by Court opponents concerning the Court’s jurisdiction over non-party nationals, as stated in the treaty—that such jurisdiction violates the Vienna Convention on the Law of Treaties in that a treaty cannot bind a non-party—is actually an argument that the treaty affects the sovereignty interests of the US. Ibid.

⁸³ Rome Statute, art. 17; CRS Report, 7; DOS *Fact Sheet*, 2.

⁸⁴ Rome Statute, art. 15; Scharf, 442. As indicated above, both the Prosecutors and Judges are elected by the Assembly, which is now comprised of over 100 different countries—many allies/friends of the US and democratic nations. It is indeed quite unlikely that the whole of the Assembly would “lose its good sense” and allow unfounded prosecutions or elect individuals who were anti-American and bent on dragging US personnel before the Court. M. Cherif Bassiouni, “Court is No Threat to Us,” *The Chicago Tribune*, 14 July 2002, 1 [hereinafter *Court is No Threat*].

⁸⁵ Rome Statute, art. 18; Scharf, 441-42. Again, this is the principle of complementarity. Speaking at a press conference in June 2002, then-US Secretary of Defense William Cohen admitted that the Court’s limited authority would serve to protect US troops and officials. Cohen indicated that “over the years” the US has clearly demonstrated that “wherever there is an allegation of abuse on the part of a soldier we have a judicial system that will deal with it very effectively. As long as we have a respected judicial system then there should be some insulation factor.” HRW *International Justice*, 1.

⁸⁶ Rome Statute, art. 8; Scharf, 442.

⁸⁷ Rome Statute, art. 16; Scharf, 442. As such, the UNSC has a “collective veto” power over the Court.

⁸⁸ CRS Report, 7. “On February 9, 2006, the Chief Prosecutor issued a letter explaining his reasons for declining to launch an investigation despite multiple submissions by private groups urging action against the US. In addition to acknowledging the limits of the Court’s jurisdiction, which he noted precluded pursuing charges based on the legality of the decision to invade, the Prosecutor noted that the allegations...were ‘of a different order than the number of victims found in other situations under investigation,’ and concluded that the allegations were of insufficient gravity to warrant an investigation.” Ibid. Luis Moreno-Ocampo, Chief Prosecutor, International Criminal Court, (in a letter with no title to multiple unnamed addressees), The

Hague, 9 February 2006 [hereinafter Moreno Letter]. Moreno explained that the Court does not have personal jurisdiction over non-state party nationals who allegedly committed crimes (the US), in non-state party territory (Iraq). More importantly, he determined that the gravity of the alleged offenses did not rise to the level of either the other crimes currently under investigation, or the threshold established by the Statute. *Ibid.*; CRS Report, 7. The basis of his decision to not investigate further shed significant light on the Court's method of analysis in reviewing allegations, and should significantly reduce US anxiety over a politicized court with a politicized prosecutor.

⁸⁹ Golzar Kheiltash, "Ocampo Turns Down Iraq Case: Implications for the US," *Global Policy Forum* (February 2006) (describing the decision and reasoning as "critical to the Court's credibility" and "demonstrate[ing] to even the staunchest critics that the ICC is truly a Court of last resort," and that it "undermines the US administration's position that the ICC is a politicized Court that will be used to unfairly target US servicemembers and personnel."); CRS Report, 7. Prosecutor Moreno also appeared content with US attempts to investigate and prosecute the alleged offenses. "In light of the conclusion reached on gravity, it was unnecessary to reach a conclusion on complementarity. It may be observed, however, that the Office also collected information on national proceedings, including commentaries from various sources, and that national proceedings had been initiated with respect to each of the relevant incidents." *Ibid.*, n.33; Moreno Letter, 1. It is important to see that the system worked as intended in all respects—to include an analysis of jurisdiction, admissibility/gravity of the alleged offenses, and complementarity.

⁹⁰ CRS Report, 8; Scharf, 442; Rome Statute, arts. 15, 46. Philippe Kirsch, the French-Canadian President of the ICC, responded to this objection to the Court as follows: "This business about politically-motivated prosecutions...[f]irst of all is extremely difficult to substantiate on the basis of the legal requirements of the statute....But also, it has received no substantiation in practice...there is not a shred of evidence that the ICC has done anything of a political nature." Joshua Rozenberg, "The Court That Tries America's Patience," *Global Policy Forum*, available from <http://www.globalpolicy.org/intljustice/icc/2006/0112patience.htm>; Internet; accessed 31 December 2006. "Concerns about a runaway prosecutor are out of place because any indictment has to be confirmed by a panel of three judges, subject to appeal before a different panel of five judges." *Court is No Threat*, 1. Thus, it would necessitate eight runaway judges, from different countries with different perspectives and agendas (if any), to confirm any unsubstantiated prosecution that one runaway prosecutor wanted to set in motion. *Ibid.*

⁹¹ "The Procedures of the ICC contain more guarantees than the American criminal justice system. They provide for every right guaranteed in the US Constitution except for a jury trial." *Court is No Threat*, 1; Scharf, 448. These include rights to a Miranda-type warning, defense counsel, reciprocal discovery, speedy trial, presumption of innocence, confront witnesses, exculpatory evidence, protection against double jeopardy, and right to appeal. Elsea, 29-39. Some commentators contend that the Statute contains "the most comprehensive list of due process protections which has so far been promulgated." *Ibid.*, 29, n.146. The only rights not afforded are the right to a trial by jury—the Court will use three-judge panels for bench trials vice a jury, to have trained international law jurists who understand the law and can provide a very detailed, written opinion as to guilt or innocence—and a change that permits the Prosecutor to appeal—which is in the event that a trial judge happens to misinterpret international law, either in favor, or not, of the defendant. Scharf, 448.

⁹² CRS Report, 9-10; Scharf, 448-49. “GWOT” refers to the US-named “Global War on Terror.”

⁹³ UN Charter, art. 39. As an *acceptable* definition of the elements of the term “aggression” has never been achieved, Article 39 of the Charter allows the UNSC to decide if aggression has occurred and, if so, to take action against “any threat to the peace, breach of the peace, or act of aggression.” Ibid.; Elsea, 20. See also Jimmy Gurule, “United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court’s Jurisdiction Truly Complementary to National Criminal Jurisdictions?,” 35 *Cornell International Law Journal*, 1-2 (2002).

⁹⁴ Rome Statute, art. 5; DOS *Fact Sheet*, 2.

⁹⁵ CRS Report, 8-9; Marc Grossman, Under Secretary for Political Affairs, Lecture, *Remarks to the Center for Strategic and International Studies*, Washington, D.C. (6 May 2002), available from <http://www.state.gov/p/9949.htm>; Internet; accessed 22 March 2007; Elsea, 20-21.

⁹⁶ When considering the US response to the formation and operation of the ICC, we should reflect back on how we as a nation—and a world—felt after we witnessed the horrors perpetrated on our citizens, and those of the world, by evil men with evil ambitions. For instance, consider this statement issued out of the Potsdam Conference in July, 1945: “There must be eliminated for all time the authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest...stern justice must be meted out to all war criminals, including those who have visited cruelties upon our prisoners...” Agreements of the Berlin (Potsdam) Conference, July 17-August 2, 1945, Annex II, 3. (b) (6), (10), available from http://www.pbs.org/wgbh/amex/truman/psources/ps_potsdam.html; Internet; accessed 15 March 2007.

⁹⁷ Jose Ayala Lasso, United Nations High Commissioner for Human Rights, lecture, Columbia School of International and Public Affairs, New York, NY, 14 May 1996.

⁹⁸ “After Rome, US concerns about the extended jurisdiction of the Court remained. Even with the deep involvement of US diplomats and military officials during the negotiations and their effective spearheading of numerous protections, the Rome Statute did not provide the US with an absolute guarantee that American uniformed personnel could not fall under the jurisdiction of the Court. Court critics [such as Senator Jesse Helms] began a heavy campaign opposing the Court, drafting legislation to assure that the US would always maintain primacy over nationals serving overseas.” Holt & Dallas, 58.

⁹⁹ P.L. 107-206, title II, 16 Stat. 899 (2002), *codified at* 22 U.S.C. Sections 7421, et seq. Congress’ intent in the ASPA was to protect US forces, and others, from the ICC’s jurisdiction.

¹⁰⁰ Senator Jesse Helms, then-Chairman of the powerful Senate Foreign Relations Committee, a staunch treaty opponent, issued a press release following Clinton’s signing, stating that, “Today’s action is a blatant attempt by a lame-duck President to tie the hands of his successor....This decision will not stand. I will make reversing this decision, and protecting America’s fighting men and women from the jurisdiction of this *international kangaroo court*, one of my highest priorities in the new Congress.” Scharf, 445 (emphasis added). One gets a keen sense of the US willingness to cooperate with the Court in its noble and groundbreaking

purpose when a leading US politician, who could dramatically impact the US ability to support the Court, refers to the ICC in public, and on the record, as an “international kangaroo court.”

¹⁰¹ P.L. 107-206, title II, 16 Stat. 899 (2002), *codified at* 22 U.S.C. Sections 7421, *et seq.* Section 2004 forbids federal, state, or local cooperation with the Court—in terms of assisting with arrest, extradition, asset forfeiture, service of warrants, searches and seizures, classified information, and other comparable assistance. 22 U.S.C. Section 7423; CRS Report, 11.

¹⁰² The Act prohibits certain types of military assistance to nations that are a party to the Statute—excepting NATO and major non-NATO allies—but have not negotiated a bilateral or executive agreement with the US to protect US personnel from prosecution by the Court. These agreements are discussed in detail below. Holt & Dallas, 60. Military assistance is defined in Chapters 2 and 5 of the Foreign Assistance Act of 1961, as amended, and the Arms Export Control Act, as covering defense articles and services and international military education and training (IMET) of foreign personnel, such as the International Fellows that grace us with their experience, wisdom, and presence on a daily basis in our seminars here at the US Army War College. The Act highlights the benefit of IMET funding, in furthering the goals of “international peace and security, improving the recipient’s self-defense capabilities, and increasing awareness of human rights.” *Ibid.*, CRS Report, 12-13, nn.57, 58; 22 U.S.C. Section 2151, *et seq.*; 22 U.S.C. Section 2763.

¹⁰³ Section 2005 restricts US peacekeeping roles when US forces are at risk of ICC prosecution—such as when the host nation is a party to the Statute, and the US has not negotiated an agreement with that country to avoid such prosecutions, and the UNSC has not permanently exempted US personnel from prosecution (requiring formal waiver of the restriction by POTUS). If the host nation is a non-party, or POTUS determines that it is in the best interests of the nation to participate, the restriction does not apply. 22 U.S.C. Section 7422; CRS Report, 11. See the detailed discussion of peacekeeping operations below.

¹⁰⁴ Scharf, 445-46; Holt & Dallas, 60; CRS Report, i.

¹⁰⁵ Article 98 states that, “The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.” Rome Statute, art. 98. Properly translated, the provision is intended to ensure that the State with which the US enters into the agreement will not surrender or transfer US personnel to the Court for prosecution. As an example, the agreement between the Philippines and the US indicates, in essence, that no personnel of one country in the territory of the other country may be “surrendered or transferred by any means” to an international court that the UNSC did not establish. Holt & Dallas, 58, n.144. Court proponents refer to these agreements as “Bilateral Immunity Agreements,” but Ambassador Scheffer indicates that a more appropriate term would be “Bilateral Non-Surrender Agreements,” as they do not provide immunity from prosecution so much as they provide protection from surrender for prosecution. *Ibid.*, 59-60. Finally, the Congressional Research Service highlights an interesting issue on this point, concerning how the US can use Article 98 of the Statute as a basis for these agreements and the non-surrender of individuals, when it has formally notified the UN that it will “not be bound by any” of the terms and obligations of the Rome Statute. CRS Report, 11-12, n.52.

¹⁰⁶ CRS Report, 13. POTUS may also waive the restriction for certain countries if he finds doing so in the national interest.

¹⁰⁷ As of 11 December 2006, the US had entered into Bilateral Agreements with 102 countries. Only 21 have been ratified by that nation's Parliament (or equivalent), and 18 qualify as executive agreements, which do not require ratification. As such, only 39 of the 102 Agreements actually have the force and effect to protect US personnel from being surrendered by that nation to the Court. Conversely, 63 do not have force and effect, and another 54 countries have publicly declared that they will not enter into any such agreement with the US. Of the 104 nations to have ratified the Statute so as to become a state-party, more than half (56) have not signed agreements with the US. Coalition for the International Criminal Court (CICC), Status of US Bilateral Immunity Agreements (BIAs), 1 (11 December 2006, available from http://www.iccnw.org/documents/CICCFS_BIAstatus_current.pdf; Internet; accessed 21 March 2007. Accordingly, assuming that the “non-surrender” agreements actually provide a modicum of protection for US personnel, state-parties as well as non-state parties are not lining up to sign these agreements, notwithstanding the heavy-handed tactics of the US in threatening to deny, and actually denying, aid to those countries (24 states-parties lost all aid and assistance from the US because they would not sign an agreement). Ibid.

¹⁰⁸ “There is an argument within the international community about the use of Article 98 agreements, as negotiated by the US since Rome, and whether they should be recognized as having precedent over the Court’s authority. This provision when originally included in the Statute was intended to cover Status of Forces Agreements (SOFAs) and Status of Mission Agreements (SOMAs), which establish the responsibilities of a nation sending troops to another country, as well as where jurisdiction lies between the US and the host government over criminal and civil issues involving the deployed personnel.” SOFAs typically cover armed forces and civilians in an official capacity, while SOMAs cover peacekeeping forces. Holt & Dallas, 59.

¹⁰⁹ Limitation on Economic Support Fund Assistance for Certain Foreign Governments that are Parties to the International Criminal Court, P.L. 108-447 (2005).

¹¹⁰ One commentator notes, however, that notwithstanding the US’ substantial concern, the US has not had, since the Court’s inception, more than a small contribution to any UN mission. In June 2002, the US had only 756 personnel on such missions, 33 of who were unarmed observers, 722 of who were police officers in Kosovo, and one who was a Soldier. By January 2006, that number had dropped to 370, with only six Soldiers. Holt & Dallas, 63.

¹¹¹ The President must report to Congress and certify that US personnel are not at risk because either the UN has granted them immunity while participating in that particular mission, or there exists some type of agreement that the US has negotiated with the host government, and other participating nations, protecting US personnel. CRS Report, 23.

¹¹² In UNSC Resolution 1422, adopted 12 July 2002, the UNSC created a “blanket deferral of prosecution” by the Court, for a one-year period, for those forces from non-party states. The Council contended that such immunity was permissible under Article 16 of the Rome Statute, which allows the UNSC to defer any investigation or prosecution for a period of up to 12 months via UNSC resolution, on a renewable basis. As such, UNSC Resolution 1487 thereafter renewed the immunity for an additional year. However, the Council, under significant pressure from many directions for wilting under the US pressure, failed to renew the resolution beyond 2004. CRS Report, 23-24; Rome Statute, art. 16.

¹¹³ In July 2003, fighting between Government forces and a number of warring factions grew increasingly more violent, threatening a humanitarian tragedy. The UN Mission in Liberia (UNMIL), which began in September 2003, was formed to “support the implementation of the ceasefire and peace agreements, support humanitarian and human rights efforts, and protect UN staff, facilities, and civilians in Liberia.” United Nations Department of Peacekeeping Operations, United Nations Mission in Liberia (23 March 2007), available from <http://www.un.org/depts/dpko/missions/unmil/>; Internet; accessed 23 March 2007.

¹¹⁴ “Having determined that the situation in Haiti continued to constitute a threat to international peace and security in the region,” as the result of armed insurgents taking over the northern portion of the country, forcing President Aristide to resign, the UNSC, pursuant to Chapter VII of the UN Charter, established the UN Stabilization Mission in Haiti (MINUSTAH) in April 2004. United Nations Department of Peacekeeping Operations, United Nations Stabilization Mission in Haiti, (23 March 2007), available from <http://www.un.org/depts/dpko/missions/minustah/>; Internet; accessed 23 March 2007.

¹¹⁵ Holt & Dallas, 63. Ruggie also happens to be an American advisor to the Secretary-General. Ibid.

¹¹⁶ The US European allies found the ASPA provision authorizing the President to “use all means necessary” to bring about the release of US and allied personnel detained or tried by the Court to be particularly distasteful. The European Union initially opposed Article 98 Agreements for its members, but relented when it received concessions from the US. Nevertheless, US attempts to obtain immunity from the Court are seen as either unnecessary or an unwarranted attempt to diminish the Court’s efforts. CRS Report, 26-27. With regard to peacekeeping missions, the UN Secretary-General, UNSC, and many in the UNGA strenuously opposed the extension of US immunity for the UN Mission in Bosnia because they believed that the US had “hijacked” UN peacekeeping efforts for its own national interests. Human rights groups and many other non-governmental organizations (NGOs) vehemently objected to all US efforts to circumvent the Court’s aims. CRS Report, i, 27, n.119; Holt & Dallas, 61, 63; see also Ibid., 63, n. 162 (citing Juan Forero, “Bush’s Aid Cuts on Court Issue Roil Neighbors,” *The New York Times*, (19 August 2005)).

¹¹⁷ The US military, and other agencies/institutions, are frustrated over the consequences of the US policy. General Bantz Craddock, then-Commander of the US Southern Command, testified before Congress that “there are negative unintended consequences that impact one half of the 92 countries in Europe and Africa through lost opportunities to provide professional military training.” He also testified that “...using IMET to encourage ICC Article 98 Agreements may have negative effects on long-term US security interests in the Western Hemisphere, a region where effective security cooperation via face-to-face contact is absolutely vital to US interests...Extra-hemispheric actors [read: China] are filling the void left by restricted US military engagement with partner nations.” US Congress, House Armed Services Committee, 109th Cong., 1st Sess., 16 March 2006. Others, such as US Secretary of State Condoleezza Rice and General James Jones, NATO Supreme Allied Commander, have made statements that mirrored those of General Craddock.

¹¹⁸ Again, these agreements do not provide immunity from prosecution, but only prevent that particular nation from surrendering US forces and officials to the ICC. If the Court obtains custody of the Americans through other means, the agreement does not prevent the ICC from prosecution—that is, the BIAs do not bind the ICC in any way. Moreover, the accords obviously

cover only those nations with which the US has negotiated an agreement, so unless the US gets every country to sign, it is not completely protected from the reach of the Court. Finally, the agreements appear to require a significant level of effort that could be better focused on working with the Court to enact changes that would enhance the Court's overall effectiveness.

¹¹⁹ Some scholars believe that US opposition to the Court will "bring about its demise," just as its failure to join the League of Nations resulted in that body's termination. Leila Nadya Sadat & S. Richard Carden, "The New International Criminal Court: An Uneasy Revolution," 88 *Georgetown Law Journal* 381, 392 (2000).

¹²⁰ Strategic communication "constitutes focused US Government efforts to understand and engage key audiences in order to create, strengthen, or preserve conditions favorable to the advancement of US Government interests, policies, and objectives through use of coordinated programs, plans, themes, messages, and products synchronized with the actions of all elements of national power." Chairman of the Joint Chiefs of Staff, *Information Operations*, Joint Publication 3-13 (Washington, D.C.: CJCS, 13 February 2006), I-10 [hereinafter JP 3-13].

¹²¹ Former US Secretary of Defense Donald Rumsfeld, in a lecture given here at the USAWC, was quoted as saying, "If I were grading, I would say that we probably deserve a 'D' or 'D-plus' as a country as to how we are doing in the battle of ideas that's taking place in the world today." Then-Secretary of Defense Donald Rumsfeld, lecture, U.S. Army War College, Carlisle Barracks, PA, 27 March 2006.

¹²² Colonel Jeryl C. Ludowese, USA, "Strategic Communications: Who Should Lead the Long War of Ideas?," in *Information as Power*, 5 (a publication of the Center for Strategic Leadership, an education center for strategic communications, research, and the experiential education of strategic leaders, located on Carlisle Barracks, PA).

¹²³ Program on International Policy Attitudes, *World Public Opinion: Global Public Opinion on International Affairs*, available from <http://www.worldpublicopinion.org>; Internet; accessed 3 February 2007. "The global view of the United States role in world affairs has significantly deteriorated over the last year according to a BBC World Service poll of more than 26,000 people across 25 different countries." Ibid. "[A]n Arab American Institute/Zogby International poll released in December 2006 of Arabs in Saudi Arabia, Egypt, Morocco, Jordan and Lebanon found a majority in every country polled—with the exception of Lebanon (47%)—reported that their opinion of the U.S. was worse than the year before. When asked how U.S. Iraq policy shapes their overall opinion of the U.S., a majority in each of the countries said it had a negative impact." Ibid.

¹²⁴ As if to bear this out, as I write this paper, scenes of violent clashes in protest of President Bush's visit to Latin America flash across the television screen—scores of individuals willing to subject themselves to "rough treatment," and even beatings, at the hands of the police, just to have their voices heard in opposition to the US. "His [Bush] real challenge, however, is that there is an enormous rejection of U.S. foreign policy in the world and America," said Arturo Valenzuela, director of the Center for Latin American Studies at Georgetown University. "In other words, there is very little affinity for the president's policies in Iraq and the ways in which he has conducted international relations over these years." Juan Carlos Lopez, "Bush Faces Widespread Opposition in Latin America," CNN.com (9 March 2007), available from <http://edition.cnn.com/2007/WORLD/americas/03/08/bush.latinamerica/index.html>; Internet; accessed 15 March 2007; Russian President Vladimir Putin, in a recent speech to an

international security conference in Munich, condemned the US for a “unilateral, militaristic approach” that had made the world a more dangerous place. Putin indicated that, “Nobody feels secure anymore, because nobody can take safety behind the stone wall of international law,” a reference to claims that the US violated the law when invading Iraq. He concluded by alleging that the US “almost uncontained hyper-use of force in international relations” was forcing countries opposed to Washington to seek to build up nuclear arsenals. “It is a world of one master, one sovereign ... it has nothing to do with democracy.” Thomas E. Ricks & Craig Whitlock, “Putin Hits US Over Unilateral Approach,” *Washington Post*, 11 February 2007, A1, available from <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/10/AR2007021000524.html>; Internet; 8 March 2007 [hereinafter Putin].

¹²⁵ Ludowese, 5; Putin, A1.

¹²⁶ “In the disparate literature on the meaning and sources of legitimacy, two characteristics stand out: first, that legitimacy is a subjective condition, a product of one’s perceptions; second, that legitimacy matters.” Edward C. Luck, “The United States, International Organizations, and the Quest for Legitimacy,” in *Multilateralism and US Foreign Policy*, eds. Steward Patrick & Shepard Forman (Boulder: Lynn Rienner Publishers, Inc., 2000), 47-48.

“In public and scholarly discourse on U.S. relations with international institutions, few terms are employed with greater frequency or less precision than “legitimacy.” Everyone wants to have it, but there is little agreement on where it comes from, what it looks like, or how more of it can be acquired. Internationalists assert that U.S. interventions abroad are seen, domestically and internationally, as more legitimate if they have been authorized by the UN Security Council or by a well-established regional agreement. Others, more skeptical of the utility and wisdom of international institutions, stress that legitimacy flows from domestic sources, that is, from the United States constitutional structures and democratic principles.” Ibid., 47. “One indicator of ...[legitimacy’s] perceived value is the frequency with which leaders of nations and international organizations assert the legitimacy of their actions and of the processes that produced them. Nowhere has the struggle for legitimacy been more pointed than in debates over US relations with international organizations.” Ibid., 48. This is true of both recent US interventions concerning Iraq in 1990 and 2003. President George H.W. Bush worked tirelessly to construct a coalition of the willing, which coalition thereafter obtained a UN Resolution mandating that action be taken against Iraq. These actions conferred a legitimacy to the use of force to expel Iraq from Kuwait, both internationally and domestically. Conversely, President George W. Bush attempted to do the same for Operation Iraqi Freedom in 2003, but was unable to form the type of coalition that the elder Bush had developed. His Administration’s significant attempts to provide a sound basis for the use of force in Iraq to depose Saddam never appeared to take root in either the international or domestic arena. As such, the second Bush Administration’s use of force in Iraq never appeared to obtain the necessary legitimacy and, consequently, was never able to generate the type of support that was present in 1990 and 1991.

¹²⁷ “Bush’s performance on the Iraq War shows...a majority of American’s polled in December (74%) give Bush negative marks – the greatest level of dissatisfaction our polling has found since we began tracking Bush’s performance on the war in 2003. Overall, the majority (54%) say Bush has performed poorly on the war and 20% say he has had fair performance – only 19% grade his performance as good and 5% as excellent.” BBS News, *Zogby Polling Shows Declining Support for Iraq War and President Bush*, available at <http://bbsnews.net/article.php/20070110141714940>; Internet; accessed 9 February 2007.

¹²⁸ “...there has been a striking change in opinion on this issue in Great Britain, the most important U.S. ally in the conflict. Just 43% of the British believe their country made the right decision to use military force against Iraq, down sharply from 61% last May.” The Pew Research Center, *The Iraq War: Mistrust of America in Europe Ever Higher, Muslim Anger Persists*, available at <http://people-press.org/reports/display>; Internet; accessed 9 February 2007. In light of the decision within the United Kingdom, in late February 2007, to begin a phased withdrawal of all forces from Iraq, it appears that the US has lost its strongest, and final, ally in the struggle for Iraq (notwithstanding the arguments that the reasons behind the withdrawal were based on the improving security situation within the British sector in southern Iraq, and their need to divert these forces to Afghanistan to support the UK’s NATO mission, the decision appears to have more to do with the untenable situation within Iraq in general). And the Brits are not the only one leaving. “President Bush’s ‘coalition of the willing,’ long seen by much of the world as a shell for a largely US operation in Iraq, is quickly becoming a coalition of the unwilling. Even as Bush sends more American forces to Baghdad, longtime war ally Tony Blair is pulling out British troops. Denmark is leaving. Lithuania says it may withdraw its tiny 53 troop contingent.” Tom Raum, Associated Press, “British Pullout in Iraq Could Signal Final Breakup of ‘Coalition of the Willing,’” *San Diego Union-Tribune*, 1 (21 February 2007), available from <http://signonsandiego.com>; Internet; accessed 13 March 2007. A recent Associated Press inquiry revealed that 22 countries still have forces in Iraq, with only 2—the UK and South Korea—having more than 1,000. Georgia and Poland have 900 each; Romania, 600; Australia, 550; Estonia, 35; Kazakhstan, 27 military engineers; the Netherlands, 15 NATO soldiers; and Slovenia, 4. Ibid., 2.

¹²⁹ This quote is from a former Administration official responsible for stability operations, who clearly understands what it takes to compete and win in the contemporary information domain, and he acknowledged the bottom line in Iraq—a forecast that applies equally as well to the ICC. Lieutenant General Thomas F. Metz, USA, et al., “Massing Effects in the Information Domain: A Case Study in Aggressive Information Operations,” *Military Review* (May-June 2005), 4 (citing to an open letter to President Bush, published in the January 2006 issue of the *Armed Forces Journal*, written by Joseph Collins, a former Deputy Assistant Secretary of Defense for Stability Operations in the Bush Administration).

¹³⁰ JP 3-13, I-10 – I-11. Ludowese, 7. The Defense Science Board, an advisory committee that provides independent advice to the Secretary of Defense, described Strategic Communications as the method by which governments “understand global audiences and cultures, engage in a dialogue between people and institutions, advise policymakers, diplomats and military leaders on the *public implications of policy choices*, and *influence attitudes and behavior through communication strategies*.” Ibid., at 8 (citing Defense Science Board, Report of the Defense Science Board Task Force on Strategic Communication (Washington, D.C.: Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, 2004), 11 (emphasis added).

¹³¹ “Detractors of the US position depict the objection as reluctance on the part of the US to be held accountable for gross human rights violations or to the standard established for the rest of the world.” CRS Report, 5.

¹³² “The U.S. has enjoyed a long reputation for leadership in the struggle against impunity and the quest for universal human rights and the rule of law.” CRS Report, 22. Some commentators believe that the US actions regarding the ICC may very well harm the US reputation and its ability to influence the development of international law. Ibid.; See, e.g., Major

Eric S. Kraus and Major Michael O. Lacey, "Utilitarian vs. Humanitarian: The Battle over the Law of War," *Parameters* (1 July 2002) (arguing that the US refusal to ratify the Rome Statute, the Ottawa Treaty, and Protocol I to the Geneva Conventions diminishes US influence on the development of customary international law).

¹³³ Colonel Kelly D. Wheaton, "Strategic Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level," *Department of the Army Pamphlet 27-50-400, The Army Lawyer* (HQDA: September 2006), 11 (arguing that "[t]he authority and necessity to use preemptive or preventive war to defend the US does not negate the inconsistency between the national strategies and the current US policy towards the ICC"); Office of the President of the United States, *The National Security Strategy of the United States of America* (Washington, D.C.: The White House, March 2006), 4-7 (calling US network of "alliances and partnerships" a "principle source strength;" "Shared principles...and commitment to cooperation provide far greater security than we could achieve on our own.;" US Department of Defense, *The National Defense Strategy of the United States of America* (Washington, D.C.: The Pentagon, March 2005), 1, 4 (indicating that US policy is to "seek and support democratic movements and institutions...with the ultimate goal of ending tyranny in our world"; recognizing that the world is threatened by "intolerance, murder, terror, enslavement, and repression," that the US must "[c]hampion aspirations for human dignity...strengthen alliances, and develop agendas for cooperative action; and finally, and most powerfully, the Strategy concludes that, "To end tyranny we must summon the collective outrage of the free world against the oppression, abuse, and impoverishment that tyrannical regimes inflict on their people—and summon their collective action against the dangers tyrants pose to the security of the world."). Accordingly, the proper US strategic communications message is that "US actions are consistent with US words"—that is, that the US "practices what it preaches," and actually lives by the standards that it sets for the international community as a world leader.

¹³⁴ Franklin D. Roosevelt, *Address at Oglethorpe University*, in John Bartlett, *Familiar Quotations* 970 (14th ed. 1968).

¹³⁵ Note that early indications demonstrate that the Court will interpret the Statute's Article 8 provisions, dealing with war crimes, quite narrowly, requiring evidence that the crimes were "committed as a part of a plan or policy or as part of a largescale commission of such crimes." Rome Statute, art. 8. See *supra* notes 57 (discussing Article 8 in greater detail) and 88-89 (noting that the Prosecutor's decision concerning allegations against the US arising out of its involvement in Iraq held that the allegations were not of such gravity, under Article 8, to be admissible before the Court).

¹³⁶ Rome Statute, art. 124. Known as the "Transitional Provision," this article permits states at the time of ratification to make a declaration that they do not accept the Court's jurisdiction over war crimes for a seven-year period, from the moment the Statute enters into force for that state. Article 126 indicates that the Statute "enters into force" for a ratifying state "on the first day of the month of the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval, or accession." *Ibid.*, art. 126. Wheaton, 12. This seven-year period was included in the Statute to give state-parties the necessary time to modify their domestic laws to comport with those in the Statute, so strengthening the principle of complementarity. Holt & Dallas, 39.

¹³⁷ Rome Statute, art. 127. The exact language of the provision states, "A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from

this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.” Ibid.

¹³⁸ Ratification allows the US to “opt out” of any new crimes that the Assembly may add by Amendment to the Statute in the coming years as well. Ibid., art 121.

¹³⁹ Chris McMorran, “International War Crimes Tribunals,” *Beyond Intractability* (July 2003), available from <http://www.beyondintractability.org>; Internet; accessed 6 March 2007.

¹⁴⁰ Ibid., 2. Victims and their families will have a chance to face those responsible for such crimes, with the hope that they will be able to then let go of the horrors of what transpired. Such Courts often help nations, attempting to move from a repressive regime that committed war crimes to a democratic one—such as in Germany—make the transition to “stable diplomatic relations and the road to peace.” Finally, such Courts, it is believed, act as a deterrent through trial and punishment, as well as through education on what transpired and why. Ibid., 1-2. “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” The Judgment of the Nuremberg Tribunal, 41-42; Norman E. Tutorow, *War Crimes, War Criminals, and War Crimes Trials: An Annotated Bibliography and Source Book* (1986), 6.

¹⁴¹ Ruth Wedgwood, “Improve the International Criminal Court,” *Toward an International Criminal Court*, (Council on Foreign Relations: 1999), 57 (indicating that the US has substantially supported the ICTY with over \$15 million per year, as well as lending “top-ranking investigators and lawyers from the federal government, the support of NATO ground forces...and even the provision of U-2 surveillance” assets). The ICC, short on resources, clearly needs the significant assets that the US can provide, along with the legitimacy that the US will lend to the Court through ratification of the Statute, or substantial cooperation and support. Doing so will gain the US such legitimacy in kind.

¹⁴² One look at the “very few” with whom the US is aligned should answer this question: Libya, Iraq (Saddam-era), Yemen, and China—certainly not the type of company that the US ordinarily wants to keep. See David J. Scheffer, “Staying the Course with the International Criminal Court,” 35 *Cornell International Law Journal* 47 (2000) (arguing that the best policy for the US is one of cooperation rather than obstruction).

¹⁴³ *Court is No Threat*, 2-3 (emphasis added).

¹⁴⁴ Ibid. There is some evidence that the US may finally be recognizing the reality of this statement, but only time will tell if this is an accurate assessment. In light of US actions concerning Darfur, Sudan, and changes to the ASPA, some believe that a “fresh assessment of the court seems to be underway.” Nora Boustany, “A Shift in the Debate on the International Court: Some US Officials Seem to Ease Disfavor,” *Washington Post Foreign Service*, 7 November 2006, A16. As to Darfur, the US abstained from the UNSC vote concerning referral of the case to the ICC. The US sent a clear message in doing so—that although it could not vote in favor of referring a case to an institution that it publicly opposed, it supported what the Court had done so far and believed that it was appropriate to have the UNSC refer the case to the Court for resolution. Ibid.; Jess Bravin, “US Warms to Hague Tribunal,” *Wall Street Journal*, 14 June 2006, A4. As to the ASPA, on 2 October and 28 November 2006, POTUS waived the prohibition on IMET funding to 21 nations, and on ESF to 14 nations. Office of the Press Secretary, The White House, Memoranda for Secretary of State, (2 October 2006; 28 November

2006), available from <http://www.whitehouse.gov/news/releases/2006/10/20061002-7.html>; Internet; accessed 25 March 2007, and <http://www.whitehouse.gov/news/releases/2006/11/200611282-12.html>; Internet; accessed 25 March 2007. Congress, in the National Defense Authorization Act for Fiscal Year 2007, removed the IMET restrictions for all nations.

¹⁴⁵ Holt & Dallas, 75; CRS Report, 28. Again, revisions to existing US law to enlarge US federal courts' jurisdiction to "cover all crimes over which the ICC might assert jurisdiction could enhance the implementation of complementarity by precluding a finding by the ICC that the US is 'unable' to prosecute one of its citizens." Ibid., 18 (citing Chief Judge Robinson O. Everett, "American Servicemembers and the ICC," *The United States and the International Criminal Court*, eds. Sarah B. Sewall and Carl Kaysen (2000), 137, 142). The War Crimes Act of 1996 covers most of the crimes within the Statute. 18 U.S.C. Section 2441. Moreover, "Some observers have suggested that Congress should pass legislation to close jurisdictional gaps in US criminal law in order to ensure US territory does not become a safe haven for those accused of genocide, war crimes, and crimes against humanity." CRS Report, 18. Again, the War Crimes Act of 1996 alleviated some of this concern by establishing US federal jurisdiction to punish war crimes, but only against US personnel. CRS Report, 18. See also Douglass Cassel, "Empowering US Courts to Hear Crimes Within the Jurisdiction of the International Court," 35 *New England Law Review*, 421, 429 (2001).

¹⁴⁶ The US must make it national policy to comprehensively investigate all allegations concerning crimes within the ICC's jurisdiction. Although it should be the uncommon and, in fact, truly extraordinary circumstance where an American national is acting in his own capacity to commit a crime within that jurisdiction, the US can protect that individual by investigating and, if appropriate and warranted, prosecuting him.

¹⁴⁷ CRS Report, 28; Rome Statute, art. 17. It is instructional to note that while I served as the Staff Judge Advocate, 1st Infantry Division (1ID), our Commanding General, MG John R.S. Batiste, instituted a policy of thoroughly investigating each and every credible allegation raised against 1ID personnel through an impartial and unbiased investigating officer. His theory was that if the allegation was determined to be unfounded, the Division could refute any subsequent claims that we had failed to take the alleged victim seriously by providing a comprehensive investigation in response to that claim, supporting the decision not to prosecute. Conversely, if the allegation was founded, we would then have the documentation necessary to determine what action, if any, should be taken, and to support any later prosecution if required. This policy proved to be extremely effective, especially in the complex and demanding setting a deployed environment such as Iraq presents. The same policy would be equally effective here to show a consistent policy which demonstrates that US efforts to investigate and, if necessary, prosecute are genuine. Finally, the Iraq referrals pertaining to the US—rejected by the ICC Prosecutor—demonstrate that a thorough investigation and, if warranted, a subsequent prosecution will likely result in a finding by the Court that US efforts were, in fact, genuine. See *supra*, notes 88-89.

¹⁴⁸ Vigen Guroian, "Post-Holocaust Political Morality: The Litmus of Bitburg and the Armenian Genocide Resolution," *Oxford Journals - Holocaust and Genocide Studies*, Vol. 3, No. 3 (1988), 305-22.

¹⁴⁹ *Armenian Genocide*, 9 – 10. This statement reflects the essence of the genocidal intent. Hitler provided more insight into his thought processes in ordering the slaughter of countless innocent Polish women and children when he told his officers that "Genghis Khan had millions of women and children killed by his own will and with a gay heart. History sees only in him a

great state builder....” Christopher Simpson, *The Splendid Blond Beast* (Monroe, ME: Common Courage Press, 1995). Hitler’s “Death’s Head Units” were actually SS units initially formed to guard concentration camps, who later became elite combat troops. Founded at Dachau and named for the skull-and-crossbones insignia worn on their uniforms, they were trained to be extraordinarily disciplined, but ruthless and cruel. Taught to view POWs as enemies to be vanquished, they became known for their extreme brutality. In 1938, obviously impressed with their ferocity and malice, Hitler pulled them from guard duty and sent them off as combat units in Poland. Acting on the field as they had in the camps with the POWs, they became known for being “cruel and vicious warriors.” For their part in the war, they were later identified as criminals and subjected to war crimes trials. Shoah Resource Center, *Death’s Head Units*, available from http://www1.yadvashem.org/odot_pdf/Microsoft%20Word%20-%206261.pdf; Internet; accessed 7 March 2007.

¹⁵⁰ These are comments from the US Ambassador for War Crimes and the primary US representative to the Rome Conference, spoken at a celebration of the Universal Declaration of Human Rights. They certainly represent all that America stands for and, presumably, they represent the US position concerning the ICC and all for which the Court stands. Scheffer, 1.

¹⁵¹ UN Secretary-General Kofi Annan, *International Criminal Court Promises Universal Justice, Secretary-General Tells International Bar Association*, address, International Bar Association, New York, NY, 12 June 1997.